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No. 081164

In The

Supreme Court of the United States

HOUSE OF REALTY, INC.,

Petitioner,

v.

CITY OF MIDWEST CITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a property owner should be afforded due process protection prior to a municipality's determination of blight as an integral part of eminent domain proceedings, when the only remedy provided to the property owner is a post-determination opportunity, limited to proving the blight determination was made in bad faith, arbitrarily, or capriciously.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, House of Realty, Inc. states that it is a privately held Oklahoma corporation. None of its shares is held by a publicly traded company.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Oklahoma State Supreme Court.

The Petitioner here and Appellant below is House of Realty, Inc.

The Respondents here and Appellees below are the City of Midwest City and Midwest City Urban Renewal Authority.

Other Defendants are Robert J. Barton, Robert J. "Bob" Barton, Trustee, Pamela L. Barton-Stober, Douglas D. Stober, Kathy L. Givens, Sharlette R. Madison, Jeffrey C. Tackett, Harlan Drake, Phillis Casey, Larry Phillips, Iris Jones, Donna Gunter, Diane Frith, Richard Spriggs, Arthur Lewis and William Klukoske, Forrest Freeman, County Treasurer and Board of County Commissioners of Oklahoma County.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES, CONSTITUTIONAL AMENDMENTS

OTHER AUTHORITIES

OPINION BELOW

The Opinion of the Oklahoma State Supreme Court is reported at *City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, 198 P.3d 886. The opinion is reprinted in the Appendix hereto, App. 1 – App. 42. The Order denying the Petition for Rehearing is reprinted in the Appendix hereto, App. 43 – App. 44.

BASIS FOR SUPREME COURT JURISDICTION

The Oklahoma Supreme Court entered its Opinion on April 1, 2008. App. 1. Petitioner timely sought rehearing, and the Oklahoma Supreme Court denied that Petition on December 15, 2008. It now seeks review of that Opinion on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1257 to review on a writ of certiorari the opinion of the highest court of a State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Due Process Clause of the United States Constitution, Fourteenth Amendment, U.S. Const. Amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .
>
> Okla. Stat. tit. 11, § 38-105(B)(1):
>
> No municipality shall exercise the authority granted by this article until after the municipal governing body shall have adopted a resolution finding that . . . [o]ne or more blighted areas exist in its area of operation . . .

STATEMENT OF THE CASE

A. Summary of Facts

Under the procedure subsequently approved by the Oklahoma Supreme Court in *City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, 198 P.3d 886, the City Council of the City of Midwest City ("City" or "City Council"), on October 12, 2004, determined House of Realty, Inc.'s ("Petitioner") 1-¼ acre tract of land to be blighted at a "legislative" meeting of the City Council, and then authorized and directed its Urban Renewal Authority ("Authority") to file condemnation proceedings against Petitioner. The Petitioner was provided with no personal service of notice of the meeting nor of the intention of the City to declare Petitioner's property to be blighted. With respect to the City's finding of blight, Petitioner was provided with no hearing, with no notice of hearing,

with no opportunity to call witnesses, and with no opportunity to examine the evidence and witnesses, if any, or other basis relied upon by the City in determining its land to be blighted.

The only notice provided by the City Council was its routine 24-hour notice of its meeting and agenda, posted at City Hall. Although the decision in *Midwest City, et al. v. House of Realty, Inc.*, 2008 OK 28, ¶ 2, 198 P.3d 886, 890, referred to the notice given to the landowners as "publication notice," the undisputed evidence was that the only prior notice of the blight determination was the posting of the agenda 24 hours prior to the meeting of the City Council.

The condemnation of Petitioner's tract was a part of the City's redevelopment project aimed at developing a large outdoor mall upon a project area consisting of more than 80 acres of both residential and commercial property. Petitioner's 1-¼ acre tract is situated on the outer edge of the project area, but at one of the entrances thereto. Petitioner's tenants disclaimed any interest in these proceedings at the trial court level.

After the City's October 12, 2004, determination that Petitioner's land was blighted, the City and its Urban Renewal Authority joined in a suit condemning Petitioner's property. Pursuant to the condemnation procedure announced by the Oklahoma Supreme Court, *Id.*, 2008 OK 28, at ¶¶ 4 and 38, 198 P.3d at 891 and 899, for Petitioner to successfully challenge the City's blight determination, it had to prove to the

trial court that the determination was made in bad faith or arbitrarily and capriciously.

The October 12, 2004, blight determination of Petitioner's tract of land was expressly based upon the City's two prior determinations of blight for the entire 80+ acre project area, one made on September 14, 2004, and one made on May 28, 2002. Both of these prior blight determinations were also made at "legislative" meetings of the City Council, with no notice provided to the affected landowners, including Petitioner, except for the same 24-hour posting of the City Council meeting agenda at City Hall. By the time the City's first determination of blight was made, over two years had expired from the time the City had first announced its intention to redevelop the area and had declared an improvement moratorium on construction in the project area. The City's primary witness admitted that the condition of the project area had deteriorated over that period of time.

Petitioner had challenged the City's right to take the property in the City's prior condemnation suit filed in 2001, based upon the City's failure to follow the procedure provided by State law for redevelopment condemnation. During this proceeding, the City had evicted Petitioner and its tenants from the property and razed all the buildings therefrom, rezoned and replatted the project area for a large retail shopping center, and acquired and ground-leased all the project area except for Petitioner's tract. Thereafter, on June 29, 2004, the Oklahoma Supreme Court

upheld Petitioner's challenge, holding that the City must abide by statutory procedure requiring municipalities to make a blight determination and go through an urban renewal authority prior to acquiring any property in a redevelopment project. After the June 2004 decision upholding Petitioner's challenge (*Midwest City v. House of Realty, Inc.*, 2004 OK 56, 100 P.3d 678), the City made a blight determination on September 14, 2004, and established an urban renewal authority. Then on October 12, 2004, with the only land in the project area not previously acquired by the City, the City made another blight determination, along with directing the Midwest City Urban Renewal Authority to condemn Petitioner's cleared property.

B. Course of Proceedings Below

This case arises from the second attempt by the officials of the City of Midwest City, Oklahoma, to condemn Petitioner's land located at the edge of an 80+ acre redevelopment project. The City's first attempt at condemnation was unsuccessful. *See Midwest City v. House of Realty, Inc.*, 2004 OK 56, 100 P.3d 678 (*House of Realty I*). The City's second attempt, by establishing and using its Midwest City Urban Renewal Authority ("URA") as the condemnor, was upheld by the Oklahoma Supreme Court. *See City of*

Midwest City, et al. v. House of Realty, Inc., 2008 OK 28, 198 P.3d 886 (*House of Realty III*).[1]

Petitioner contends that it was denied notice and hearing on the City's determination of blight of its property and that such blight determination was all but determinative of the City's right to take its property. The Oklahoma Supreme Court affirmed the Urban Renewal Authority's right to take Petitioner's property, holding the Petitioner's right to challenge the blight determination in court met Fourteenth Amendment due process standards, even though, to prevail, Petitioner was required to prove the legislative blight determination was made in bad faith or arbitrarily and capriciously. The Oklahoma Supreme Court held that because the City's blight determination was "legislative" rather than "judicial," no due process notice or hearing thereupon was required. *Midwest City, et al. v. House of Realty, Inc.*, 2008 OK 28, ¶¶ 2, 4 and 38, 198 P.3d 886, 890-891 and 899 (App. 7-9, 10, 39).

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[1] The Oklahoma Supreme Court decision in what has been referred to elsewhere as "*House of Realty II*", *House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, 109 P.3d 314, does not bear on the issues involved in this Petition for Certiorari.

REASONS WHY CERTIORARI SHOULD BE GRANTED

There are not many issues which affect a citizen as profoundly as the government's taking of his or her property. In many states, including Oklahoma, a finding of blight is required before the government can take a citizen's property for economic redevelopment pursuant to eminent domain proceedings. Yet, as it currently stands, there is inconsistency and confusion in the State courts as to what Fourteenth Amendment due process such property owners are entitled before that determination is made. As it currently stands, Oklahoma, pursuant to the Oklahoma Supreme Court's opinion in this matter, is one of the states in which a property owner is afforded no ability to appear and be heard before the municipality "takes" his or her property pursuant to a finding of blight. Review is important in this matter to allow this Court to resolve all such doubt or confusion on this matter so as to give clarification to citizens and governmental entities alike as to whether, and when, property owners are entitled to notice and an opportunity to be heard before the government makes a blight decision required for an eminent domain taking.

I. Review Is Warranted Because this Court Should Resolve the Confusion Among State Courts as to Whether a Property Owner's Due Process Rights Should Be Protected Prior to a Determination of Blight

At the lower court level, the Oklahoma Supreme Court held that due process protections do not arise at the stage where the determination of blight is considered by a governmental authority and therefore joined in a long line of opinions out of the State courts which have caused confusion regarding just when due process is required when the government takes a citizen's property for just compensation. Despite the confusion on the ultimate issue in this case, this Court has yet to render any specific decision on whether, and when, a property owner is entitled to his or her due process rights before a governmental entity makes a determination of blight required for a "taking" of the property.

Petitioner realizes that the particular statutes of each state may differ in some respect as to the procedure a municipality must undertake before condemning private property. However, one's Constitutional rights do not differ as to whether a property owner is entitled to due process before the government takes his or her property pursuant to eminent domain proceedings. Therefore, Petitioner is asking this Court to review this matter to decide whether a property owner is entitled to due process protections on a blight determination when such a determination

is a pivotal factor in a taking accomplished under the power of eminent domain.

With this caveat, many of the State-court decisions on this matter, including most that the Oklahoma Supreme Court relied upon, provide little guidance in this matter or are distinguishable with cases like this one. *See Trager v. Peabody Redevelopment Auth.*, 367 F.Supp. 1000 (D.Mass. 1973) (mere determination that a particular area is blighted as an initial step is not a constructive taking); *Matter of Condemnation by Urban Development Auth. of Pittsburgh*, 527 Pa. 550, 594 A.2d 1375 (1991) (certification of blight was made on broad range of citizens and does not have legal effect on property rights); *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 66 N.W.2d 362 (1954) (determination of blight does not constitute an appropriation of property).

The rationale underlying many of the decisions which indicate that due process is not required for a blight determination is stated by the Court in *Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E.2d 18, 27 (1945) which found:

> No such notice to the property owners is necessary to comply with the requirements of due process of law. No property is taken in this proceeding under section 42 (corresponding to the hearing on blight in this case). *The property rights of the landowners are in nowise affected.* This is *merely another of the steps* required by the statute authorizing a

> redevelopment corporation to exercise the power of eminent domain. [Emphasis added].

In *Zurn*, and in most of the cases finding no due process violation, the facts are such that the blight determination is not a decisive factor in the governmental entity's exercise of the power of eminent domain.

In this matter, and in other such similar cases, the blight determination directly affects the property rights of landowners because such a determination is a requirement for the taking. As spelled out in Oklahoma Statutes, Okla. Stat. tit. 11, § 38-103 states that a municipality should formulate a workable program for its "area of operation" to eliminate and prevent the development or spread of blight, to encourage needed rehabilitation, and to provide for the redevelopment of blighted areas. Additionally, Okla. Stat. tit. 11, § 38-105(B)(1) specifically states that "[n]o municipality shall exercise the authority granted by this article until ***after*** the municipal governing body shall have adopted a resolution finding that . . . [o]ne or more blighted areas exist in its area of operation . . . " [Emphasis added]. Clearly, the statutes emphasize the importance of the blight determination, yet there is no statutorily required notice and due process afforded property owners.

In this same vein, it must also be clear that Petitioner is not challenging the City's claim that the property is being taken for a "public use" or for a "public purpose." This is the first decision made by

the City when it established its plan to revitalize Midwest City by taking property for economic redevelopment. *See* Okla. Stat. tit. 11, § 38-103. Pursuant to this Court's decisions in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), and others, Petitioner realizes that such a determination is allowable.

However, once that initial determination is made, and the City decides to act pursuant to Oklahoma Statutes regarding "Urban Renewal," which requires a determination of blight,[2] the City's decision on that issue culminates the "taking" of the property. In other words, the blight decision is not simply another step in the process. As set out in the Oklahoma Statutes, and the facts of this case, the City made the decision to take any property in the "area of operation" which is determined to be "blighted." Therefore, the determining factor between one piece of property being taken by the government and one piece of property remaining in the hands of the original landowner is the blight determination. Unquestionably, such a determination becomes ***the*** instrumental decision in the eminent domain proceedings.

Once again, this clarification is important because it highlights the differences between the instant matter and other authorities cited by the Oklahoma Supreme Court in which the real question was not the determination of blight, but whether the

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[2] Okla. Stat. tit. 11, § 38-105(B)(1).

property was being taken for a legitimate public purpose. *See Brody v. Village of Port Chester*, 434 F.3d 121 (2nd Cir. 2005) (owner not entitled to hearing on issue of public use before initial decision of taking is made); *United States Steel v. Koehr*, 811 S.W.2d 385 (Mo. 1991) (owner of each tract of land in a blighted area cannot be permitted to resist redevelopment programs on the ground that his property is not being taken for a public use).

The confusion evident among the States is evidenced in conflicting opinions in Indiana. Although Petitioner is not asking this Court to decide an issue of Indiana law, this analysis is reflective of the inconsistency of decisions in this area, and it highlights the importance of making a definitive decision on if and when due process is required for blight determinations which have a major impact on the government's taking of private property.

The Oklahoma Supreme Court cited to the decision of the Indiana Appellate Court in *Reel Pipe & Valve Co., Inc. v. Consolidated City of Indianapolis-Marion County*, 633 N.E.2d 274 (Ind.App. 1994), cert. denied, 513 U.S. 1058, 115 S.Ct. 667, 130 L.Ed.2d 601 (1994). Yet, in that matter, the determination of blight had already been made even before the hearing for which the landowners desired actual notice in accordance with due process. *Id.* at 278. Therefore, the landowners' request for due process did not accurately match the Petitioner's request in this matter. The Court also decided that the decision was a legislative one, a distinction discussed below. *Id.*

On the other hand, the Indiana Supreme Court in *Jeffersonville Redevelopment Commission v. City of Jeffersonville*, 248 Ind. 468, 229 N.E.2d 825, 827 (1967) found that those persons affected by a Declaratory Resolution for the taking of private property should have a right to call upon the City to explain all the information and data it utilized in deciding whether or not the area described in the Declaratory Resolution was, in truth, blighted. Ultimately, it found that a hearing should be meaningful and that evidence of blight should be "freely given" under due process considerations. *Id.*

It then relied upon the following language which is quite persuasive in determining this matter:

> A full hearing at which every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts, is essential for wise and just application of the authority of administrative agencies . . .

Jeffersonville, 229 N.E.2d at 471; (quoting 2 Am.Jur.2d, Administrative Law, § 397). The *Jeffersonville* Court also wisely and astutely recognized that an "administrative tribunal cannot rely on its own information for support of its findings," and that its blight finding must be "based on evidence produced in the hearing at which an opportunity is given to all interested parties to offer evidence and cross-examine witnesses." *Id.* (Citing *Gigger v. Board of*

Fire and Police Comm'rs of City of East St. Louis, 23 Ill.App.2d 433, 163 N.E.2d 541 (1959)).

The *Jeffersonville* decision was cited favorably in *Brenwick Associates, LLC v. Boone County Redevelopment Comm'n*, 870 N.E.2d 474 (Ind.App. 2007), in which the Court found that:

> In *Jeffersonville*, at issue was whether the property of specific landowners was blighted. **Such a determination would have a *specific affect [sic] on specific landowners*, as a determination of blight would allow the government to condemn property via eminent domain. Our Supreme Court determined that *someone at risk of losing property due to a determination of blight should enjoy the due process rights* of cross-examination and hearing all evidence against them.** [Emphasis added].

Brenwick, 870 N.E.2d at 483 (citing *Jeffersonville*, 229 N.E.2d at 827); *see also Bradley v. Bankert*, 616 N.E.2d 18, 22 (Ind.Ct.App. 1993) (holding that a board of zoning appeals was acting in a quasi-judicial role when it interpreted an ordinance to resolve an existing controversy and "its interpretation had the effect of determining the legal rights of specific persons.").

As can be seen from the Oklahoma Supreme Court's decision in this matter, as well as other decisions on the issue across the United States, there is confusion and inconsistency on the issue of whether a

property owner is entitled to his or her due process rights under the Fourteenth Amendment of the United States Constitution prior to the government's determination of blight. This Court should grant review in the instant matter to resolve this issue with finality.

II. Review Is Necessary to Decide Whether the Determination of Blight Is More Akin to a Judicial Proceeding than a Legislative Proceeding

The difference between cases such as the instant matter and other cases which appear similar in most respects may best be described by the dichotomy between judicial proceedings and legislative proceedings. The Oklahoma Supreme Court stated as such in *Wood v. Independent School District No. 141 of Pottawatomie County*, 1983 OK 30, ¶ 17, 661 P.2d 892, by stating that "[i]t is elementary that due process is a flexible concept, depending in large measure on the nature of the rights at stake and the nature of the proceedings." (Citing *Arnett v. Kennedy*, 416 U.S. 134, 155, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)).

This determination was a key part to the Oklahoma Supreme Court's opinion and it served as an important factor in many of the other State-court cases where it was held the landowner was not entitled to his or her due process protections prior to the determination of blight. Therefore, the issue of whether a blight finding is a judicial or legislative decision is a key component in whether due process

should be afforded to property owners whose land is subject to a government taking.

In fact, like the instant matter, the reason property owners are ultimately not afforded due process protection is because the particular court held that the blight determination was a legislative proceeding, not a judicial one. For example, in *Apostle v. City of Seattle*, 459 P.2d 792, 797 (Wash. 1969), the Washington State Supreme Court noted that in "numerous" cases around the country, it had been held that the hearing on the issue of blight in an urban renewal proceeding is legislative in nature, rather than judicial. (Citing, e.g., *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837 (1958)).

The judicial versus legislative distinction can be the determining factor in the analysis on this issue because, as this Court readily knows, **the opportunity to be heard is an *essential requisite* of due process of law in judicial proceedings**. *See Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (citing *Windsor v. McVeigh*, 93 U.S. 274, 277, 23 L.Ed. 914 (1876); *Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236, 20 S.Ct. 620, 622, 44 L.Ed. 747 (1900); *Simon v. Craft*, 182 U.S. 427, 436, 21 S.Ct. 836, 839, 45 L.Ed. 1165 (1901)). Therefore, if this Court decides that the City's blight determination was a judicial proceeding, the failure to provide an opportunity to be heard on the matter would be a direct violation of one's Constitutional rights no matter the particular statutory language utilized by each State.

Of course, this Court is no stranger to the dichotomy between judicial proceedings and legislative proceedings. As early as 1908, this Court laid out the parameters of that determination. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908), this Court found that a ***judicial*** inquiry "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

On the other hand, a ***legislative*** decision "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Id.* at 226. In *Prentis*, these definitions allowed this Court to find that the establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial. *Id.*

This distinction as set out in *Prentis* was likewise cited with favor in the Oklahoma courts with the decision of *In re Southwestern Bell Tel. L.P. v. State ex rel. Okla.Corp. Comm'n*, 2007 OK 55, ¶ 11, 164 P.3d 150, but was curiously not addressed or specifically discussed in the Oklahoma Supreme Court's Opinion in this matter. The Oklahoma Supreme Court did make the valid point that a determination of what is "judicial" or "legislative" is "not always a clear one." Opinion, pg. App. 17, ¶ 13. This realization simply confirms that often such a distinction becomes nothing more than a word game, substituting a property owner's true right to due process for a convenient

label or "clever use" of words. Opinion, pg. App. 42, ¶ 2 to Dissent.

It is submitted that the distinction drawn by the State courts between "legislative" and "judicial" was never meant to be applied in situations where a government body makes a decision so decisively determining a property owner's right to protect his property from appropriation. As stated by Justice Cardozo in *Snyder v. Com. of Mass.*, 291 U.S. 97, 114, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934):

> A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence. . . .

It appears that the Oklahoma Supreme Court and other State courts have proven Justice Cardozo to be correct. The task of assigning a label to the blight determination fails to match the real reasons that brought the rule or label into existence. Essentially, the "legislative versus judicial" distinction has become nothing more than a convenient crutch carried by the courts resulting in the foreclosure of certain Constitutional rights.

Moreover, under this Court's own definition of "judicial" and "legislative" proceedings, a determination of blight seems to fit more closely with the definition of a judicial proceeding. A blight consideration investigates each property owner's land and declares whether it is blighted pursuant to a legislatively-mandated list of elements based upon the facts as they exist at that time. The City did not look to the future and make a new rule to be applied thereafter for other properties. The "legislative" decision, using the correct definition established by this Court, was the City's decision to use eminent domain and its selection of the "area of operation" under Oklahoma law.

However, as stated above, Petitioner is not challenging the City's redevelopment plan, a seemingly "legislative" decision which established a standard or plan to be applied thereafter. Instead, Petitioner is challenging the City's action in "investigating" and declaring their property to be blighted, which, as was established above, was the ultimate decision clearing the way for the City's taking of their property. If a label must be attached to such an important, final decision, it should be labeled a judicial inquiry, and the property owner should be entitled to appropriate due process procedures.

III. Review Is Warranted Because *Mathews v. Eldridge* Requires a Governmental Entity to Recognize a Property Owner's Due Process Rights Prior to Making a Determination of Blight

Notwithstanding any attempt to label the particular type of action a governmental entity takes when it makes a blight determination, this Court should also examine the City's blight determination under the nature of the rights at stake and the proceedings as announced in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In *Mathews*, this Court established a guideline to determine whether a given procedure is required by due process when it struck a balance among:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the process used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 336.

Notably, the Oklahoma Supreme Court in its Opinion below failed to address the guidelines this Court established in *Mathews*, nor did it apply those guidelines to the City's determination of blight in the instant matter. In order for this Court to fully

examine the issue presented to it in this appeal, it is necessary to look at this matter with an eye towards the *Mathews* balancing test.

First, the private interest affected by the City's determination of blight is the landowner's ownership and interest in his or her private property subject to condemnation. The City's official action of taking one's private property due to a determination that the property is "blighted" will substantially affect the landowner's interest without, as it currently stands, any opportunity for the landowner to be heard on the issue of blight. The effect of such a determination has a profound impact upon one of the fundamental rights specifically listed in the Constitution that the government should not deprive without due process of law, i.e., "life, liberty, or ***property***." [Emphasis added]. *See* U.S. Const. Amend. XIV, § 1.

Second, the risk of an erroneous deprivation would appear obviously to be substantial. The City's decision on blight is a final decision approving condemnation and the razing of a landowner's building, and an erroneous deprivation has long-lasting and irreversible consequences for the land owner. The deference standard of judicial review provides no forum for a challenge of the correctness of the City's determination of blight. Such a determination, once made, can only be reversed at a later date (often years later), and then only if the landowner can prove in a condemnation proceeding that the City's blight determination was in bad faith or was arbitrary and capricious.

Additionally, the risk for an erroneous deprivation of property is higher in situations in which the governmental entity is ostensibly acting for purposes of economic development. In these scenarios, it is more likely that the government's blight determination could be motivated by the desire to increase revenues or by the viability of private parties interested in making increased revenues through a new business in the area or through contracts with the City to build on the property. The more properties declared as blighted, the more such unsavory motivations can be advanced.

Of course, a city council may be acting in good faith and still be very wrong in applying the blight standards to a specific project area. It is therefore important that when a blight determination is the determining factor in an eminent domain action, the landowner whose property is being made subject to appropriation without his consent should at least be given the right to notice and a hearing where he can challenge the city's blight evidence and put on his own evidence.

Ultimately, in addition to providing protection to landowners, these procedural safeguards would provide valuable information to the governmental entity prior to a blight decision which would originally be based only upon incomplete or cursory evidence. Absent the affected property owners being provided the right to notice and a full adjudicatory hearing at the initial blight determination, the City will never hear evidence contrary to that provided by

the proponents of the proposed economic use of the property to replace the "blighted area." Furthermore, there would be no challenge to the municipality's own selected experts, who never represent they are, nor do they pretend to be, objective.

Any argument that the district court can hear this evidence pursuant to some judicial condemnation proceeding is a bit misleading, since the trial court may not reverse the City unless it finds it acted arbitrarily, capriciously or in bad faith, which is a difficult burden to overcome. Providing landowners with notice and the right to a due process hearing on the initial determination of blight is the *only meaningful* process the property owner has to effectively challenge the blight decision.

Finally, providing notice to the affected landowners prior to the blight determination would not unduly burden the governmental entities involved in the decision. Although each factual situation would differ, at the most, a due process hearing on the blight determination by a municipality would involve a few days' time. For example, a special master could be appointed to take evidence and render a recommendation based thereon. This is not an uncommon governmental function and would not be burdensome. And while it would involve a bit more expense, such a price tag would not near the costs of protracted litigation. Quite simply, this is a small price to pay for fairness and equity relative to a government's taking of one's personal property.

Although the Oklahoma Supreme Court did not conduct an analysis of the due process issue under this Court's decision in *Mathews*, Petitioner contends that such an analysis is necessary and further proves that property owners should be entitled to notice and an opportunity to be heard prior to a governmental entity's determination as to whether a particular property is "blighted." Such a determination is extremely important and decisive in many eminent domain proceedings, and the small amount of time and expense incurred is outweighed by the sheer finality and irreversibility of such a decision made without any input from the landowner. Review is necessary to analyze this issue under the *Mathews* decision.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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2008 OK 28

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

City of Midwest City and Midwest City Urban Renewal Authority, Appellees, v. House of Realty, Inc., Appellant, and Robert J. Barton, Robert J. "Bob" Barton, Trustee, Pamela L. Barton-Stober, Douglas D. Stober, Kathy L. Givens, Sharlette R. Madison, Jeffrey C. Tackett, Harlan Drake, Phillis Casey, Larry Phillips, Iris Jones, Donna Gunter, Diane Frith, Richard Spriggs, Arthur Lewis and William Klukoske, Forrest Freeman, County Treasurer and Board of County Commissioners of Oklahoma County, Defendants.	No. 104,349 Consolidated with No. 104,526 FOR OFFICIAL PUBLICATION

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

(Filed Apr. 1, 2008)

¶0 The companion cases arise from an ongoing dispute between the appellee, City of Midwest City (City), and the appellant, House of Realty (landowner), concerning the City's attempt to condemn the landowner's property. In *City of Midwest City* v. *House of Realty, Inc. [Realty I],* 2004 OK 56, 100 P.3d 678, the Court held that the City did not possess authority to exercise powers of eminent domain for purposes of economic development and the removal of blighted property under the Local Development Act, 62 O.S. 2001 §850, *et seq.* We held in *House of Realty, Inc.* v. *City of Midwest City [Realty II],* 2004 OK 97, 109 P.3d 314 that: 1) the issue of whether the City could use a general power of eminent domain combined with the Local Development Act was rendered moot by the City's abandonment of attempts to condemn the landowner's property; 2) the cause should be remanded for a determination of whether authority existed exempting the public trust from the general prohibition against operating a retail outlet contained in 60 O.S. 2001 §178.4; and 3) the amended and restated trust indenture of the public trust required a vote of the people before monies derived from the trust's compounded principal could be invested in the economic development project. On remand from *Realty II* and in response to the City's declaratory judgment action requesting approval of the City's Urban Renewal Plan along with the

renewed attempt to condemn the landowner's property, the trial court consolidated the two causes. After a bench trial, the trial court: sustained the City's findings of blight; found the City's urban renewal plan to have been validly adopted in accordance with the urban renewal laws, 11 O.S. 2001 §38-101, *et seq.*; and denied the landowner's exceptions to the commissioners' report. We hold that: 1) the City met due process requirements in providing publication notice of meetings at which blight determinations were made; 2) the City complied substantially with the statutory requirements of 11 O.S. 2001 §38-106(B) providing that a municipal governing body may only approve an urban renewal plan once the governing body has determined, by resolution, that the area is blighted, and, thereafter, acquire the property covered by the plan; and 3) the City did not act arbitrarily, capriciously or in bad faith in making the determinations of blight.

REQUEST FOR ORAL ARGUMENT DENIED; AFFIRMED.

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For Appellant.

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Renewal Authority.

WATT, J:

¶1 The companion appeals are considered together and consolidated for the sole purpose of promulgating one opinion[1] addressing the three issues presented. The first is whether the landowner's due process[2]

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[1] *In re Adoption of M.J.S.*, 2007 OK 43, ¶1, 162 P.3d 200; *City of Midwest City* v. *House of Realty, Inc. [Realty I]*, 2004 OK 56, ¶1, 100 P.3d 678.

[2] The United States Const., amend XIV providing in pertinent part:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . "

The Okla. Const. art. 2, §7 providing:

> "No person shall be deprived of liberty or property, without due process of law."

rights were denied by the City's publication notice of meetings at which blight[3] determinations were adopted. Second, whether the City complied substantially with the statutory requirements of 11 O.S. 2001 §38-106(B)[4] providing that a municipal governing

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[3] Title 11 O.S. 2001 §38-101(8) providing:

"'Blighted area' shall mean an area in which there are properties, buildings, or improvements, whether occupied or vacant, whether residential or nonresidential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation or open spaces; population overcrowding, improper subdivision or obsolete platting of land, inadequate parcel size; arrested economic development; improper street layout in terms of existing or projected traffic needs, traffic congestion or lack of parking or terminal facilities needed for existing or proposed land uses in the area, predominance of defective or inadequate street layouts; faulty lot layout in relation to size, adequacy, accessibility or usefulness; insanitary or unsafe conditions, deterioration of site or other improvements; diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; any one or combination of such conditions which substantially impair or arrest the sound growth of municipalities, or constitutes an economic or social liability, or which endangers life or property by fire or other causes, or is conducive to ill health, transmission of disease, mortality, juvenile delinquency, or crime and by reason thereof, is detrimental to the public health, safety, morals or welfare . . . "

[4] Title 38 OS. 2001 §38-106 providing in pertinent part:

" . . . (B) A municipal governing body shall not approve an urban renewal plan for an urban renewal area unless such governing body, by resolution, has determined such area to be a blighted area and designated each area or

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body shall[5] not approve an urban renewal plan unless the governing body has determined, by resolution,

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portion thereof, as appropriate for an urban renewal project. The municipal governing body shall not approve an urban renewal plan or project until a general plan for the municipality has been adopted as the long-range development policy, and such urban renewal plan shall adhere thereto; provided, however, that such general plan must have designated and delineated urban renewal areas, established the appropriate reuse of such areas and established priorities for the rehabilitation reuse of such areas and established priorities for the rehabilitation or clearance and redevelopment of such areas. The Urban Renewal Authority or a municipality shall not acquire real property for an urban renewal project unless the municipal governing body has approved the urban renewal plan in accordance with Subsection D of this section. . . .

D. The municipal governing body shall hold a public hearing on an urban renewal plan, after public notice thereof by publication at least one time not less than fifteen (15) days prior to the date of such public hearing, in a newspaper having general circulation in the area of operation of the municipality; and by posting not less than five (5) public notice signs, each having at least nine (9) square feet of display area, for a period of fifteen (15) successive days including the day of the public hearing for which notice is being given, in the area affected by the proposed urban renewal plan, and shall outline the general nature and scope of the urban renewal project under consideration. . . ."

[5] Generally, the use of "shall" signifies a command. *Zeier* v. *Zimmer, Inc.*, 2006 OK 98, ¶7, 152 P.3d 861; *Cox* v. *State ex rel. Oklahoma Dept. of Human Services*, 2004 OK 17, ¶21, 87 P.3d 607; *United States through Farmers Home Admin.* v. *Hobbs*, 1996 OK 77, ¶7, 921 P.2d 338. Nevertheless, there may be times when the term is permissive in nature. *Cox* v. *State ex rel.*

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that the area is blighted and may acquire properties subject to the plan only after its approval. Finally, whether the City acted arbitrarily, capriciously and in bad faith in making the blight determination.

¶2 As to the first issue, we hold that the City complied with due process requirements in providing publication notice[6] of meetings at which blight

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Oklahoma Dept. of Human Services, this note, *supra*; *Minie* v. *Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082; *Texaco, Inc.* v. *City of Oklahoma City*, 1980 OK 169, ¶9, 619 P.2d 869

[6] Title 25 O.S. 2001 §311 providing in pertinent part:

"A. Notwithstanding any other provisions of law, all regularly scheduled, continued or reconvened, special or emergency meetings of public bodies shall be preceded by public notice as follows:

1. All public bodies shall give notice in writing by December 15 of each calendar year of the schedule showing the date, time and place of the regularly scheduled meetings of such public bodies for the following calendar year. . . .

4. All municipal public bodies, including, but not limited to, public trusts and any other bodies with the municipality as beneficiary, shall give such notice to the municipal clerk of the municipality wherein they are principally located. . . .

9. In addition to the advance public notice in writing required to be filed for regularly scheduled meetings, all public bodies shall, at least twenty-four (24) hours prior to such meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting, such twenty-four (24) hour prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma; provided, however, the posting of an agenda shall not preclude a public body from considering at

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determinations were made. The determination is

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its regularly scheduled meeting any new business. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. 'New business', as used here, shall mean any matter not known about or which could not have been reasonably foreseen prior to the time of posting. . . .

11. Special meetings of public bodies shall not be held without public notice being given at least forty-eight (48) hours prior to said meetings. Such public notice of date, time and place shall be given in writing, in person or by telephone means to the Secretary of State or to the county clerk or to the municipal clerk by public bodies in the manner set forth in paragraphs 2, 3, 4, 5 and 6 of this section. The public body also shall cause written notice of the date, time and place of the meeting to be mailed or delivered to each person, newspaper, wire service, radio station, and television station that has filed a written request for notice of meetings of the public body with the clerk or secretary of the public body or with some other person designated by the public body. Such written notice shall be mailed or delivered at least forty-eight (48) hours prior to the special meeting. . . . In addition, all public bodies shall, at least twenty-four (24) hours prior to such special meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting. Only matters appearing on the posted agenda may be considered at said special meeting. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. Twenty-four (24) hours prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma. . . ."

supported by: *Isaacs* v. *Oklahoma City,* 1966 OK 267, 437 P.2d 229,[7] *cert. denied,* 389 U.S. 825, 88 S.Ct. 63, 19 L.Ed.2d 79 (1967) in which this Court recognized that blight determinations are legislative rather than adjudicatory proceedings[8] coupled with a long line of Oklahoma jurisprudence holding that due process protections do not apply in legislative proceedings;[9] the lack of any requirement in either the Local Development Act or the Urban Renewal Act for personal notice of blight proceedings;[10] and the landowner's opportunity to enjoy the full range of due process protections in the condemnation proceedings.[11]

¶3 Second, under the facts presented, it is clear that blight determinations were made before the

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[7] *See also, Board of County Comm'rs of Muskogee County* v. *Lowery,* 2006 OK 31, fn. 11, 136 P.3d 639, 21 A.L.R. 6th 855.

[8] *Isaacs* v. *Oklahoma City,* 1966 OK 267, ¶18, 437 P.2d 229, *cert. denied,* 389 U.S. 825, 88 S.Ct. 63, 19 L.Ed.2d 79 (1967) [There is no "judicial" authority conferred upon a municipality by the Urban Renewal Law.]

[9] *Cox Oklahoma Telecom, L.L.C.* v. *State ex rel. Oklahoma Corporation Comm'n, see* note 26, *infra*; *Southwestern Bell Telephone Co.* v. *Oklahoma Corporation Comm'n, see* note 26, *infra*; *Henry* v. *Corporation Comm'n, see* note 26, *infra*; *State ex rel. Cartwright* v. *Southwestern Bell Telephone Co., see* note 26, *infra*; *Horton* v. *City of Oklahoma City, see* note 26, *infra*; *Chickasha Cotton Oil Co.* v. *Corporation Comm'n, see* note 26, *infra*; *Gant* v. *City of Oklahoma City, see* note 26, *infra*; *Harrington* v. *City of Tulsa, see* note 26, *infra*; *City of Tulsa* v. *Weston, see* note 26, *infra.*

[10] *See, Henry* v. *Corporation Comm'n,* note 9, *supra.*

[11] *See,* ¶¶ 17-19, *infra,* and accompanying footnotes.

urban renewal plan was adopted and the City renewed its attempt to condemn the property at issue after the plan's adoption. Therefore, we determine that the City complied substantially with the statutory requirements of 11 O.S. 2001 §38-106(B).[12]

¶4 Finally, we may overturn the City's blight determinations only if, in making the findings, it acted arbitrarily or capriciously.[13] There is no evidence of abuse. Rather, we hold that the record contains sufficient evidence to support a finding of blight.

FACTS AND PROCEDURAL HISTORY[14]

¶5 In *City of Midwest City* v. *House of Realty, Inc. [Realty I],* 2004 OK 56, 100 P.3d 678, the Court held that the City did not possess authority to exercise powers of eminent domain for purposes of economic development and the removal of blighted property under the Local Development Act, 62 O.S. 2001 §850, *et seq.* We held in *House of Realty, Inc.* v. *City of Midwest City [Realty II],* 2004 OK 97, 109 P.3d 314 that: 1) the issue of whether the City could use a general power of eminent domain combined with the

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[12] Title 11 O.S. 2001 §38-106(B), note 4, *supra.*

[13] *McConnell* v. *Town of Tipton, see* note 51, *infra.*

[14] The facts necessary to the decision of *City of Midwest City* v. *House of Realty, Inc. [Realty I], see* note 1, *supra* and *House of Realty, Inc.* v. *City of Midwest City [Realty II],* 2004 OK 97, 109 P.3d 314, are outlined in the respective opinions. Only where necessary for the resolution of the companion appeals will those facts be repeated here.

Local Development Act was rendered moot by the City's abandonment of attempts to condemn the landowner's property; 2) the cause should be remanded for a determination of whether authority existed exempting the public trust from the general prohibition against operating a retail outlet contained in 60 O.S. 2001 §178.4;[15] and 3) the amended and restated trust indenture of the public trust required a vote of the people before monies derived from the trust's compounded principal could be invested in the economic development project.

¶6 The companion appeals represent the third and fourth causes arising originally from a joint plan of the City and the Midwest City Memorial Hospital Authority (Hospital Authority) to redevelop approximately eighty acres on S.E. 29th Street (development

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[15] Title 60 O.S. 2001 §178.4 providing in pertinent part:

"Trusts created under the provisions of Sections 176 through 180.55 of this title or any amendments or extensions thereof shall not include any trust purpose, function nor activity: in any wholesale outlet, unless said wholesale outlet is a direct part of the industry. Provided, however, that the distribution centers for intoxicating and nonintoxicating alcoholic beverages as defined in Title 37 of the Oklahoma Statutes shall not qualify under the provisions of this title; nor shall it include a retail outlet unless said retail outlet is operated in conjunction with and on the same premises as the industrial, manufacturing, cultural, recreational, parking, transportation or airport facility . . . "

Although the section was amended in 2003, the language of the new statute is virtually identical to that quoted above.

area) in Midwest City. In these appeals, the only portion of the tract subject to condemnation is the landowner's one and one-forth (1¼) acre holding located near the northeast corner of S.E. 29th.

¶7 We recognized in *Realty I* that the City made a determination that the area at issue was blighted as early as May 28, 2002.[16] In response to the decisions in *Realty I* and *Realty II,* the City adopted Resolution No. 2004-19 on September 14, 2004. The resolution acknowledged that blight, consistent with the definition encompassed within Oklahoma's urban renewal laws, existed in the development area. The City also confirmed the May 28, 2002, finding of blight and directed that an urban renewal plan be

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[16] *City of Midwest City* v. *House of Realty, Inc. (Realty I), see* note 1 at ¶35, *supra*, providing in pertinent part:

> "The City of Midwest City states that the property for its project is blighted for purposes of the Local Development Act. The City's [sic] made this determination using, with one exception, language from the Local Development Act. The City of Midwest City passed ordinance No. 2002-11 on May 28, 2002, and stated therein:
>
> . . . 4. The Project Area is and was a blighted area because of each and a combination of the following factors: dilapidation, obsolescence, deterioration, presence of structures below minimum code standards, abandonment, excessive vacancies, arrested economic development, deleterious land use or layout, depreciation of physical maintenance and lack of community planning; and . . . "

prepared for the development area.[17] On October 12, 2004, the City adopted Resolution No. 2004-25, which specifically referred to the May 28, 2002, finding of blight and cited *Realty I* for the proposition that the Oklahoma urban renewal laws allowed municipalities

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[17] Resolution No. 2004-19, approved September 14, 2004, providing in pertinent part:

> " . . . NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MIDWEST CITY, OKLAHOMA:
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> 1. The Council hereby finds and confirms that blighted areas as defined in the Urban Redevelopment Law of the State of Oklahoma, 11 O.S. §§ 38-101(8), exist within the corporate boundaries and jurisdiction of the City and that the rehabilitation, conservation, redevelopment or a combination thereof of such areas is necessary in the interest of the public health, safety, morals and welfare of the residents of such areas. . . .
>
> 4. The Council hereby confirms its previous finding in Resolution No. 2002-11 on May 28, 2002, that the area depicted on the map attached to this resolution as Exhibit A is and was a blighted area because of each and a combination of the following factors; dilapidation, obsolescence, deterioration, presence of structures below minimum code standards, abandonment, excessive vacancies, arrested economic development, deleterious land use or layout, depreciation of physical maintenance and lack of community planning. . . .
>
> 6. The Council hereby finds it appropriate and directs that an urban renewal plan be prepared for the area depicted on the map attached to this resolution as Exhibit A in order to aide in the planning, undertaking and carrying out of the objectives of the Project Plan. . . ."

to acquire properties through condemnation. Furthermore, the resolution adopted the Midwest City Downtown Urban Renewal Plan and authorized the acquisition of property through condemnation as identified in the plan.[18] The City's urban renewal plan

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[18] Resolution No. 2004-25, October 12, 2004, providing in pertinent part:

> . . . WHEREAS, the City Council found on May 28, 2002 in Resolution No. 2002-11, that the Project Area suffered from blighting conditions identified in the Oklahoma Urban Renewal Law, 11 O.S. §38-101(8), and that the Project Area 'is and was a blighted area because of each and a combination of the following factors: dilapidation, obsolescence, deterioration, presence of structures below minimum code standards, abandonment, excessive vacancies, arrested economic development, deleterious land use or layout, depreciation of physical maintenance and lack of community planning' . . .
>
> WHEREAS, on June 29, 2004, the Oklahoma Supreme Court in *City of Midwest City* v. *House of Realty, Inc.*, 2004 OK 56, 100 P.3d 678, decided that the City, in relying on its general municipal powers including those granted in 11 O.S. §§ 22-104(3) and (8) to condemn property, 'did not possess authority pursuant to its general eminent domain powers to condemn the property apart from those statutes regulating the joint conduct of municipalities and public trusts when removing blighted property and creating economic redevelopment' and the Court specifically determined that the Oklahoma Urban Renewal Law, 11 O.S. §§ 38-101-38-123, is one of two such statutes under which the authority to condemn for redevelopment exists; and . . .

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provides for the obtaining of any properties not previously acquired by the Hospital Authority.[19]

¶8 The original commissioners' report issued on March 15, 2002; and the assessed damages were deposited with the court clerk. Requests to stay *Realty I* and *Realty II* were denied both by the trial court and this Court in the spring of 2004. Following the issuance of mandate in *Realty I,* on April 29, 2004, the City took possession of the landowner's property, demolishing the structures on the tract. Except for the existence of one retail outlet, the entire project area was cleared by July of 2004.

¶9 On November 20th and 21st, 2006, a two day bench trial was held to resolve issues on remand from *Realty II* and in response to the City's declaratory

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2. The Midwest City Downtown Urban Renewal Plan, having been duly reviewed and considered, is hereby adopted and approved . . .

6. It is hereby found and determined that it is necessary, appropriate, and desirable to authorize the Midwest City Urban Renewal Authority to acquire property by eminent domain as provided in the Midwest City Downtown Urban Renewal Plan . . . "

[19] Midwest City Urban Renewal Plan providing at §IV. A:

"*Acquisition.* Acquisition of the redevelopment project property within the project area by the Midwest City Urban Renewal Authority is authorized, including acquisition by exercise of eminent domain, to carry out the purposes of the urban renewal plan in accordance with 11 O.S. §38-111, excluding properties previously acquired by the Midwest City Memorial Hospital Authority."

judgment action requesting approval of the City's Urban Renewal Plan along with the renewed attempt to condemn the landowner's property. The trial court consolidated the two causes; sustained the City's findings of blight; found the City's urban renewal plan to have been validly adopted in accordance with the urban renewal laws, 11 O.S. 2001 §38-101, *et seq.*; and denied the landowner's exceptions to the commissioners' report. Petitions in error were filed in the two causes in February and March of 2007, respectively. On April 13, 2007, the landowner filed a motion to consolidate the related appeals. The City requested that the causes be retained in its motion of May 3, 2007. We made the causes companion cases and granted the motion to retain. The briefing cycle was completed on December 11, 2007.

DISCUSSION

¶10 a. The City met due process requirements by providing publication notice of meetings at which blight determinations were made.

¶11 The landowner asserts that the City's blight determinations were judicial in that they were adjudications of the "character of the use" pursuant to the Oklahoma Constitution art. 2, §24.[20] He also

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[20] The Okla. Const. art. 2, §24 providing in pertinent part:

" . . . In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

contends that due process required that he receive: personal notice of the City's meetings in which blight determinations were considered; a full hearing on the blight issue; the opportunity to present witnesses; and the right to cross examine the City's witnesses. The City argues that all due process requirements were satisfied by publication notice of meetings at which blight conditions were considered and through the landowner's opportunity to appear and defend against the taking in district court. It asserts that the blight determinations did not amount to a taking, but rather were legislative determinations not subject to the full range of due process protections. We agree with the City's arguments.

¶12 1) Where, as here, the Legislature has provided the statutory standard for a finding of blight, the determination is legislative rather than judicial in nature.

¶13 The line between what is legislative and what is judicial is not always a clear one. We agree with the landowner that blight is the public purpose that constitutionally justifies the subsequent sale of property for private use.[21] Nevertheless, the City's failure to give the landowner personal notice of its intent to consider the issue of blight did not constitute a violation of due process.

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[21] *City of Midwest City* v. *House of Realty, Inc [Realty I]*, *see* note 1, *supra*.

¶14 The Court answered the question of whether a municipality's determination of blight under urban renewal statutes constituted a judicial determination in *Isaacs* v. *Oklahoma City,* 1966 OK 267, 437 P.2d 229, *cert. denied,* 389 U.S. 825, 88 S.Ct. 63, 19 L.Ed.2d 79 (1967). At issue in *Isaacs* was the constitutionality of urban redevelopment/renewal laws allowing blighted property to be condemned. One ground upon which the urban renewal laws were attacked was that they allowed a municipality, like Midwest City here, to "judicially" determine blighted areas. In resolving the issue, the Court stated in pertinent part at ¶18:

> " . . . The act does authorize the city to declare and identify blighted areas, but only according to the standards set forth in the act. **Such determination is manifestly not an exercise of 'judicial' authority.** There is no 'judicial authority' conferred upon the city by the act."[22] [Emphasis provided.]

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[22] Other courts have likewise held that a blight determination is a legislative act. *See, Norfolk Redevelopment & Housing Auth.* v. *C & C Real Estate, Inc.,* 272 Va. 2, 630 S.E.2d 505 (2006); *Apospo-ros* v. *Urban Redevelopment Comm'n of City of Stamford,* 259 Conn. 563, 790 A.2d 1167 (2002); *State ex rel. United States Steel* v. *Koehr, see* note 28, *infra*; *Real Pipe & Valve Co., Inc.* v. *Consolidated City of Indianapolis-Marion County,* 633 N.E.2d 274 (Ind.App. 1994), *see* note 28, *infra*; *In re City of Scranton,* 132 Pa.Cmwlth. 175, 572 A.2d 250 (1990), *appeal denied,* 527 Pa. 131, 589 A.2d 204 (1991) and 527 Pa. 619, 590 A.2d 760 (1991); *Apostle* v. *City of Seattle,* 77 Wash.2d 59, 459 P.2d 792 (1969); *Anaheim Redevelopment Agency* v. *Dusek,* 193 Cal.App.3d 249, 239 Cal.Rptr. 319 (1987).

Just as the Legislature set forth the standard necessary for a determination of blight in the urban renewal statute at issue in *Isaacs,* it has done so in 11 O.S. 2001 §38-101(8) providing:

> "'Blighted area' shall mean an area in which there are properties, buildings, or improvements, whether occupied or vacant, whether residential or nonresidential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation or open spaces; population overcrowding, improper subdivision or obsolete platting of land, inadequate parcel size; arrested economic development; improper street layout in terms of existing or projected traffic needs, traffic congestion or lack of parking or terminal facilities needed for existing or proposed land uses in the area, predominance of defective or inadequate street layouts; faulty lot layout in relation to size, adequacy, accessibility or usefulness; insanitary or unsafe conditions, deterioration of site or other improvements; diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title; any one or combination of such conditions which substantially impair or arrest the sound growth of municipalities, or constitutes an economic or social liability, or which endangers life or property by fire or other causes, or is conducive to ill health, transmission of disease, mortality, juvenile delinquency, or crime and by reason thereof,

> is detrimental to the public health, safety, morals or welfare . . . "

The combination of this Court's holding in *Isaacs* and the Legislature's establishment of a standard for the blight determination pursuant to 11 O.S. 2001 §38-101(8), makes it clear that the City's blight finding was legislative in nature.

¶15 2) There is no statutory requirement for individual notice before a municipality may make a blight determination. Absent such a statutorily imposed standard, due process is not violated by lack of personal notice concerning a municipality's legislative actions.

¶16 Neither the Local Development Act,[23] under which the original blight determination was made,

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[23] Title 62 O.S. Supp. 2003 §859 providing in pertinent part:

"A. Before the adoption of a project plan or subsequent amendments thereto, the governing body must hold two public hearings. . . .

B. Notice of the first public hearing shall be given once by publication in a newspaper with circulation in the city, town or county. Such notice must be published no later than fourteen (14) days before the date of the public hearing. . . .

C. Notice of the second public hearing may be included in the publication notice provided for in subsection B of this section. Notice of the second public hearing shall be published in the same manner as the notice provided for in subsection B of this section . . .

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nor the urban renewal laws[24] require that the landowner receive personal notice of the City's blight determination. Absent such a statutorily imposed notice requirement,[25] due process of law is not violated because the property owner did not get personal notice or an opportunity to be heard during the council meetings concerning blight.[26]

E. Technical irregularities in the form of the notice required by this section shall not result in the invalidation of any ordinance enacted or amended subsequent thereto, so long as the notice, as published, reasonably apprises interested parties as to the subject matter of the hearings and correctly describes the date, time and place of such hearings."

[24] Title 11 O.S. 2001 §38-106(D), *see* note 4, *supra*.

[25] *Henry* v. *Corporation Comm'n*, *see* note 26, *infra*; *Chickasha Cotton Oil Co.* v. *Corporation Comm'n*, *see* note 26, *infra*;

[26] *Cox Oklahoma Telecom, L.L.C.* v. *State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶¶ 14-16, 164 P.3d 150; *Southwestern Bell Telephone Co.* v. *Oklahoma Corp. Comm'n*, 1994 OK 38, ¶9, 873 P.2d 1001, *cert. denied*, 513 U.S. 869, 115 S.Ct. 191, 130 L.Ed.2d 123 (1994); *Henry* v. *Corporation Comm'n*, 1990 OK 103, 1990 OK 104, ¶9, 825 P.2d 1262; *State ex rel. Cartwright* v. *Southwestern Bell Telephone Co.*, 1983 OK 40, ¶23, 662 P.2d 675; *Horton* v. *City of Oklahoma City*, 1977 OK 87, ¶20, 566 P.2d 431, *appeal dismissed*, 434 U.S. 1056, 98 S.Ct. 1222, 55 L.Ed.2d 755 (1978); *Chickasha Cotton Oil Co.* v. *Corporation Comm'n*, 1977 OK 40, ¶4, 562 P.2d 507, *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 88 (1971); *Gant* v. *City of Oklahoma City*, 1931 OK 241, ¶5, 6 P.2d 1065, 86 A.L.R. 794, *appeal dismissed*, 284 U.S. 594, 52 S.Ct. 203, 76 L.Ed. 512 (1932); *City of Tulsa* v. *Weston*, 1924 OK 578, ¶42, 229 P. 108, *error dismissed*, 269 U.S. 540, 46 S.Ct. 202, 70 L.Ed. 401 (1926); *Chicago, R.I. & P.Ry. Co.* v. *State*, 1917 OK 471, ¶6, 168 P. 239. *See also*, *Utley* v. *St. Petersburg*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155 (1934), *rehearing*

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denied, 292 U.S. 604, 54 S.Ct. 712, 78 L. E#d. [sic] 1466 (1934); *New York & New England Railway Co.* v. *Town of Bristol,* 151 U.S. 556, 14 S.Ct. 437, 38 L.Ed. 269 (1894); *Harrington* v. *City of Tulsa,* 1934 OK 711, ¶0, 39 P.2d 120.

The landowner does not contend that the publication notice given violated provisions of the Oklahoma Open Meeting Act (Open Meeting Act), 25 O.S. 2001 §301, *et seq.,* or the Urban Removal Act, 11 O.S. 2001 §38-101, *et seq.* Furthermore, the record contains testimony indicating that the notice required pursuant to the Open Meeting Act was provided for each meeting at which the blight determinations were considered along with special notice requirements of the Urban Renewal Act.

Transcript of proceedings, November 21, 2006, Katherine Bolles, City Attorney for the City, providing in pertinent part at pp. 322-325:

> ". . . . Q. And what's your position with City of Midwest City?
>
> A. I have been the city attorney there since 1991.
>
> Q. And as part of your job as city attorney, are you responsible for assuring that there's proper notice of city council functions?
>
> A. Yes, sir.
>
> Q. I'm going to ask you very briefly about notice for the various resolutions that are before the Court in this case. Will you share with us and the Court what kind of notice, if any, was provided regarding Exhibit 3, which is Resolution 2002-11, which is the May 28th, 2002, finding of blight?
>
> A. Most resolutions don't require any special notice. This resolution would have been advertised or published in the agenda for the city council meeting the 28th day of May, 2002, which indicates to me that it was a regular meeting.
>
> So notice for all regular meetings of political subdivision of the state, of which the City is one, has to be

(Continued on following page)

filed with the city clerk prior to December 15th for the following year, all regular meetings.

This was a regular meeting, so that notice would have been filed. Then the agenda that contained this item would have been posted in excess of 24 hours prior to the meeting in view of the public.

Q. And that's in accordance with the Open Meetings Act?

A. That is in – we always operate in strict accordance with the Oklahoma Open Meetings Act.

Q. How about Exhibit 5, Resolution 2004-19, which is the September 14th city council resolution reaffirming blight existing in this area?

A. It would have been advertised in the same way. And as I say, normal resolutions such as this do not require any additional or special publication or posting requirements.

Q. And would your answer be the same for Exhibit 4, which is Ordinance 2852, . . . adoption of – excuse me the adoption of the project plan in 2002?

A. There is a little bit – there's not additional posting requirements, but because this is an emergency ordinance, it does have to be listed as such on the agenda, and this was listed as such on the agenda.

Q. The specific ordinance?

A. The specific ordinance was listed on the agenda, but also the fact that it was an emergency ordinance, it does have to be identified as an emergency ordinance and the emergency clause has to be acted on separately, and it was. . . ."

Title 11 O.S. 2001 §38-106(D), *see* note 3, *supra*.

Transcript of proceedings, November 20-21, 2006, Katherine Bolles, City Attorney for the City, providing in pertinent part at pp. 325-6:

Q. Same – same question, the kind of notice as to Exhibit 8, Resolution 2004-25, which is the Urban

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Renewal Act, adoption of the Midwest City Downtown Urban Renewal Plan.

A. The adoption of the Urban Renewal Plan does – because it is done at a public meeting, has to receive the same types of notice requirements as far as publishing on the agenda and posting it, because it also requires addition – it also has additional publication requirements as well, and those were satisfied in this case. . . .

Q. . . . And the last two, the Urban Renewal Authority meetings, one referred to in Landowner's Exhibit 27, the Urban Renewal Authority meeting of September 16, 2004, and October 13, 2004, which is Exhibit 20A.

A. Now, the Urban Renewal Authority meetings would have been a little bit different in that because they don't – meetings like the city council does or the hospital authority does, those would have been all special meetings, and so special meetings, the notice has to be filed with the city clerk at least 48 hours prior to the meeting, and then an agenda posted for in excess of – for at least 24 hours prior to the meeting occurring, and that was done for those meetings of the Urban Renewal Authority.

Q. . . . I think I asked you about the Ordinance 2852, which is exhibit 40. Do you recall that testimony?

A. Yes, sir.

Q. And did you cause publication in the local newspaper to be made concerning the adoption of that ordinance?

A. Yes. There's a requirement under the Urban Renewal laws that it be published once prior to the hearing, and that was done. We do have an affidavit of publication. . . ."

¶17 3) The landowner became entitled to and was afforded the full range of due process protections in the condemnation proceedings.

¶18 Although necessity is not to be equated with public use or public purpose,[27] the Court's opinion in *Pippin* v. *Board of Comm'rs of Okmulgee County,* 1922 OK 305, 209 P. 929 is instructive on the issue of when due process protections are to be afforded in a condemnation proceeding. In *Pippin,* the landowner asserted that the statutory scheme allowing the commissioners' determination that his property was necessary for highway construction, without prior personal notice of the meeting at which the issue was to be considered, was unconstitutional. The *Pippin* Court disagreed. It held that the commissioners' decision regarding public necessity could not be equated with a taking. The Court reasoned that the determination did not authorize any individual to enter the landowner's property. Rather, it was a preliminary step necessary to allow the institution of condemnation proceedings. Furthermore, the opinion acknowledged that the due process of law promised by the Constitution was afforded to the property owner through participation in the condemnation proceedings.[28]

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[27] *Board of County Commissioners of Muskogee County* v. *Lowery, see* note 7, *supra*.

[28] *Arthur* v. *Board of Comm'rs of Choctaw County,* 1914 OK 181, ¶15, 141 P. 1. *See also, Brody* v. *Village of Port Chester,* 434 F.3d 121 (2nd Cir. 2005) [Although the landowner relies on this

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cause on the notice issue, the federal court made it clear that a property owner has no due process right to participate in the initial decision by a governmental authority to exercise eminent domain. The opinion providing in pertinent part: "[a]side from the inherent lack of logic in the claim that Brody is entitled to a hearing on the issue of public use *before* the Village makes its determination, such a rule would impose an impossible burden on the condemnor and would represent an unwarranted judicial arrogation of the legislature's power to condemn."]; *Trager* v. *Peabody Redevelopment Auth.*, 367 F.Supp. 1000 (D.Mass 1973) [The mere determination by a governmental authority that a particular area of real estates is "blighted" as an initial step in an urban renewal project is not a constructive taking even though the determination has an adverse effect on the value of the property.]; *Matter of Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 527 Pa. 550, 594 A.2d 1375 (1991), *cert. denied*, 502 U.S. 1004, 112 S.Ct. 638, 116 L.Ed.2d 656 (1991) [Certification of blight is not an adjudication having legal effect on property rights.]; *State ex rel. United States Steel* v. *Koehr*, 811 S.W.2d 385 (Tex. [sic] 1991) [Due process does not require owner be given notice that property was included in area subject to be declared as blighted.]; *David Jeffrey Co.* v. *City of Milwaukee*, 267 Wis. 559, 66 N.W.2d 362 (1954) [Determinations of blight do not constitute an appropriation of property in the area designated as blighted necessitating due process procedures.]; *Concerned Citizens of Princeton, Inc.* v. *Mayor & Council of Borough of Princeton*, 370 N.J.Super. 429, 851 A.2d 685 (2004), *cert. denied*, 182 N.J. 139, 861 A.2d 844 (2004) [Borough was not required to serve notice upon landowners or businesses. Sufficient notice was achieved by public notice.]; *Reel Pipe & Valve Co., Inc.* v. *Consolidated City of Indianapolis-Marion County*, 633 N.E.2d 274 (Ind.App. 1994), *cert. denied*, 513 U.S. 1058, 115 S.Ct. 667, 130 L.Ed.2d 601 (1994) [Landowners not entitled to actual notice of public hearing at which blight determination is made]. *See also*, *Griggs* v. *Borough of Princeton*, 33 N.J. 207, 162 A.2d 862 (1960) [Even where statute provided for personal notice, blight determination would not be invalidated for failure to follow statutorily mandated procedures.]; "Eminent Domain: Due Process in the Certification Process is Attenuated," 21-DEC

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¶19 Under the reasoning in *Pippin,* due process protections do not arise at the stage where an initial determination of blight is considered by a governmental authority. The rights of personal notice, the opportunity to be heard, and to cross-examine witnesses are appropriate and must be afforded when a landowner's property becomes subject to forfeiture. Here, the landowner does not argue that he was denied due process in the condemnation proceeding. Indeed, he has exercised those rights vigorously over the last eight years.[29]

Real Est. L.Rep. 5 (1991) [Analyzing Pennsylvania law and noting that due process issues do not come into play during the stage of proceedings in which blight is determined because the certification does not inevitably lead to condemnation and a deprivation of property.]. *But see, Merrill* v. *City of Manchester,* 124 N.H. 8, 466 A.2d 923 (1983) [Property owners' equal protection rights were violated when they were denied a hearing before determination of blight was made.]; *W&G Co.* v. *Redevelopment Agency of Salt Lake City,* 802 P.2d 755 [Utah App. 1990] [Individual notice required under the statutory scheme.]; *In re City of Scranton, see* note 22, *supra* [No rights of property owner are affected at time of certification of blight which would require implementation of due process procedures.].

[29] *See, Pippin* v. *Board of Comm'rs of Okmulgee County,* 1922 OK 305, 209 P. 929. *See also, City of Midwest City* v. *House of Realty, Inc. [Realty I],* note 1, *supra*; *House of Realty, Inc.* v. *City of Midwest City [Realty II],* note 14, *supra.*

¶20 b. The City complied substantially with the statutory requirements of 11 O.S. 2001 §38-106(B) providing that a municipal governing body may approve an urban renewal plan after the governing body has determined, by resolution, that the area is blighted, and may begin the acquisition of properties subsequent to the adoption of the urban renewal plan.

¶21 At issue are the procedural requirements of 11 O.S. 2001 §38-106(B) providing in pertinent part that:

> "A municipal governing body shall not approve an urban renewal plan for an urban renewal area unless such governing body, by resolution, has determined such area to be a blighted area and designated such area **or portion thereof**, as appropriate for an urban renewal project. . . . The Urban Renewal Authority or a municipality shall not acquire real property for an urban renewal project unless the municipal governing body has approved the urban renewal plan . . . " [Emphasis provided.]

¶22 The landowner's arguments regarding the City's failure to follow the urban renewal laws largely regard timing issues under 11 O.S. 2001 §38-106(B).[30] The landowner asserts that, pursuant to the statute, blight determinations must precede the adoption of

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[30] Title 11 O.S. 2001 §38-106(B), *see* note 4, *supra*.

an urban renewal plan and that properties in the development area may not be acquired until after an urban renewal plan is adopted. The City does not dispute the landowner's contentions. Rather, it insists that it complied with the procedural requirements of the urban renewal laws by making valid blight determinations before the urban renewal plan was adopted in October of 2004. Furthermore, the City insists that any properties acquired before the adoption of the urban renewal plan were purchased, not in contemplation of urban renewal, but rather by the Hospital Authority pursuant to the Local Development Act. Finally, it contends that the property it is attempting to acquire pursuant to the urban renewal plan extends only to the landowner's real estate. We agree that the City complied substantially with the statutory requirements of 11 O.S. 2001 §38-106(B).[31]

¶23 1) The City's blight determination, originally made on May 28, 2002, and subsequently reconfirmed on September 14, 2004, preceded the City's adoption of an urban renewal plan on October 12, 2004.

¶24 This Court recognized in *Realty I* that the City originally adopted a finding of blight in Resolution No. 2002-11 on May 28, 2002, for purposes of the Local Development Act.[32] We also acknowledged that

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[31] *Id.*

[32] *See*, note 16, *supra*.

the presence of blight could be based upon a single factor when applying the urban renewal statutes and that the definition of blight included within the Local Development Act encompassed blighted areas as defined by the urban renewal laws.[33]

¶25 On September 14, 2004, the City confirmed that the project area contained blighted areas as defined under the Urban Redevelopment Law in Resolution No. 2004-19 and readopted its earlier finding of blight of May 28th, 2002.[34] Resolution 2004-25, adopted on October 12, 2004, also contained blight findings and referred to the original determination of blight made on May 28, 2002. This resolution also

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[33] *City of Midwest City* v. *House of Realty, Inc., [Realty I], see* note 1, *supra*, providing in pertinent part:

at ¶20

> " . . . [T]he presence of blight may be based upon the presence of a single factor when applying the Urban Renewal Act . . . ";

at ¶30

> "Although the definition of a 'blighted area in §853 includes a blighted area as defined . . . [by the Urban Renewal Act']," §853 does not require applying the Urban Renewal definition . . . "

The landowner does not contend that the factors cited as constituting blight in the May 28th ordinance are insufficient to meet the definition of blight contained in the urban renewal laws. We note that the factors listed in the May 28th resolution as constituting blight, *see* note 16, *supra*, encompass a number of the factors listed in 38 O.S. 2001 §38-101(8), *see* note 3, *supra*, defining blight for urban renewal purposes.

[34] *See*, Resolution No. 2004-19, approved September 14, 2004, note 17, *supra*.

accepted the plan for urban renewal.[35] Under these facts, the landowner's argument that there was no blight determination before the plan for urban renewal was adopted is unconvincing.

¶26 2) The City did not renew its attempt to acquire the landowner's property for urban renewal purposes until after the Urban Renewal Plan was adopted on October 12, 2004.

¶27 The Urban Renewal Plan was adopted on October 12, 2004, pursuant to Resolution No. 2004-25.[36] Any properties acquired before that date were either purchased or condemned under the Local Development Act. They were not acquired for purposes of urban renewal.

¶28 Nothing in 11 O.S. 2001 §38-106(B)[37] commands that all properties within an entire project area be acquired pursuant to the urban renewal plan. Rather, the statute merely provides that the project area have a blight determination before the adoption of an urban renewal plan and that "**a portion thereof**" be appropriate for urban renewal.[38] The

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[35] *See*, Resolution No. 2004-25, approved October 12, 2004, note 18, *supra*.

[36] *Id.*

[37] Title 11 O.S. 2001 §30-106(B), *see* note 4, *supra*.

[38] If a statute is plain and unambiguous and its meaning clear, no occasion exists for the rules of construction. Rather, the statute will be accorded the meaning expressed by the

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urban renewal plan acknowledged not only that some properties within the project had been acquired previously, but that only real property not previously obtained would be subject to acquisition pursuant to the urban renewal plan.[39]

¶29 The landowner's real estate is the only property subject to acquisition under the urban renewal plan. It is the property identified in the urban renewal plans as the "real property not previously obtained." Only after adoption of the urban renewal plan did the City renew attempts to obtain the landowner's property through condemnation proceedings.

¶30 The facts demonstrate that there were blight determinations which preceded the City's adoption of an urban renewal plan and that the only property subject to condemnation under the plan was the landowner's real estate. Under these facts, the City complied substantially with the requirements of 11 O.S. 2001 §38-106(B).[40]

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legislative language utilized. *Wylie* v. *Chesser,* 2007 OK 81, ¶19, 173 P.3d 64; *Wilson* v. *Catoosa Public Schools,* 2007 OK 20, ¶11, 157 P.3d 1149; *Heldermon* v. *Wright,* 2006 OK 86, ¶12, 152 P.3d 855.

[39] *Midwest City Urban Renewal Plan, see* note 19, *supra.*

[40] Title 11 O.S. 2001 §38-106(B), *see* note 4, *supra.*

¶31 c) The City did not act arbitrarily, capriciously or in bad faith in making its determinations of blight.

¶32 The landowner makes a final, catch all argument[41] that the trial court erred in overruling its exceptions to the commissioners' report because the City acted arbitrarily, capriciously and in bad faith in making the blight determinations. The City asserts that the argument lacks all evidentiary support. The City's actions do not rise to a level warranting our intervention.[42]

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[41] Four of the eight contentions involved relate to the issue of the City's blight determinations. The arguments are that the City's actions must be arbitrary and capricious and executed in bad faith, because: 1) the first blight determination was made May 28, 2002, almost two years after the City commenced acquiring property in the Project area; 2) the first blight determination was made only after the Landowner challenged the City's right to take under the general condemnation statutes and then was pursued under the Local Development Act; 3) the 2004 blight determinations were made after the project area, except for the Landowner's 1-¼ acre tract had been cleared of all structures; and 4) the September 14, 2004, blight determination referred to no supporting evidence; and the October 12, 2004, blight determination was based upon a September 30, 2004, "Report of Conditions" which expounded upon conditions which had been remedied. Our determination that the City's blight determinations conformed substantially with 11 O.S. 2001 §38-106(B), *see* note 4, *supra*, make it unnecessary to address these contentions.

[42] A condemnor's decision as to the necessity for taking property will not be disturbed in absence of fraud, bad faith, or abuse of discretion. *Public Service Co. of Oklahoma* v. *Willis*, 1997 OK 78, ¶14, 941 P.2d 995; *Rueb* v. *Oklahoma City*, 1967 OK

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¶33 Because statements by City officials initially indicated that the revamping of downtown Midwest City was needed to improve the public image, the landowner is convinced that the City's utilization of blight to justify condemnation proceedings was in bad faith. The assertion in [sic] unconvincing. There is no question that one of the main goals when the project plan was initially considered was economic development. Nevertheless, the question presented in *Realty I* was:

> "[W]hether a municipality's authority to condemn property **for economic redevelopment and blight removal** is limited to special statutes expressly giving such authority, or in the alternative whether a municipality may condemn property **for blight removal and economic development** pursuant to a general power of eminent domain." [Emphasis added.]

The language in *Realty I* makes it clear that, from the instigation of the City's first attempts to obtain properties in the project area, blight served as at least one basis for the City's actions.

¶34 The landowner relies upon statements by a City official and a council member as presenting

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233, ¶0, 435 P.2d 139. A trial court's decision regarding the necessity of the taking will not be disturbed on review unless clearly against the weight of the evidence. *Cunningham* v. *State ex rel. Oklahoma Planning & Resources Bd.*, 1954 OK 349, ¶0, 277 P.2d 990.

evidence of the City's bad faith. The first was noted in *Realty I* and involved a statement by the City's Development Services Director that the City proceeded, initially, under the Local Development Act because it believed that the property didn't meet all the definitions of blighted conditions. The second concerned a statement by a council member regarding the September 14, 2004, council meeting. Evidently, the council member was asked whether the meeting would affect the landowner's property. The council member indicated the meeting would involve urban renewal but that it would not involve the landowner's property. Finally, the landowner takes exception to a statement made by the redeveloper indicating that the landowner's property was needed in 2004 to satisfy an anchor tenant rather than for the elimination of blight.

¶35 The governing body of a municipality is its city council.[43] The powers of a municipal government are exercised through the council as a whole rather than by any single council member or city official.[44] There is no evidence that either of the statements made by the City employee or by its council member were in bad faith or with the express intent to mislead the landowner. If an individual council member

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[43] Title 11 O.S. 2001 §1-102 providing in pertinent part:

"As used in the Oklahoma Municipal Code:

. . . 3. 'Governing body' . . . means the city council of a city . . . "

[44] *See, Blinn* v. *Hassman*, 1933 OK 37, ¶0, 18 P.2d 881.

or employee cannot speak for the council as a whole, it follows that a contractor also lacks such authority.

¶36 Finally, the landowner points to evidence of bad faith in the 2004 blight determinations based on the fact that, by that point in time, the land had been cleared and some improvements were underway. The argument ignores the fact that the first blight determination was made in 2002, and that each of the subsequent determinations related back to the 2002 determination and to the factors which existed in 1999 when the original attempt to acquire the properties was initiated.

¶37 The record is replete with evidence to support the existence of blight in the project area. Along with structures which continued to deteriorate,[45] property located adjacent to the landowner's structure was suffering from soil contamination,[46]

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[45] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at pp. 219-20:

> " . . . Q. Between April of 2000 when this picture was taken and May 28th, 2002, when the determination of blight was made, did the shopping center get any better or any worse?
>
> A. No, it got – it got worse. . . ."

[46] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at p. 225:

> " . . . Q. All right. And would you tell Her Honor, using Exhibit 23A immediately to your right, where this property would be located? We can see – especially in relation to the subject.
>
> A. This property is located right here (indicating).

(Continued on following page)

while the landowner's building and surrounding area was showing signs of age and deterioration and the lack of adequate parking.[47] There were other buildings in the area which had asbestos[48] or gasoline

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Q. Adjacent to the Barton property?

A. Yes. . . .

Q. We're – the building, of course, I could ask you about age and obsolescence, but let's talk about imperiling public safety, which we'll talk about in a minute. How does – how does this property imperil public safety, in light of what you just testified to?

A. Well, public safety, you – you never want your – your soil contaminated or – or your ground water contaminated with pollutants. . . ."

[47] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at pp. 229-30:

" . . . Q. Okay. What does this show about – and this is, of course, the House of Realty office. Could you tell Her Honor what this shows about age and deterioration of buildings and so forth, setbacks and parking and signage and all that.

A. It's – clearly – clearly the City would not permit a building to go in with setbacks on a – on a major arterial road such as Air Depot, but also it shows just the deteriorating aspects of the building, parking issues. . . ."

[48] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at p. 232:

" . . . Q. . . . [C]ould you show to the Court where the old Skytrain Movie Theater is?

. . . Q. And why is it in red in you chart, which is Exhibit 23A?

A. That building was found to have asbestos contamination in it. . . ."

contamination.[49] Even after the land was cleared, the City continued to deal with public utility deficiencies.[50]

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[49] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at p. 243:

"... Q. You're talking about here (indicating)?

... A. That is the same building that has the asbestos found in it, and you can see it in the rear, before it was remediated. But also in the forefront here, this is the – the building that was some type of dentist or doctor's office at one time and had the basement that had gasoline contamination in it. ..."

[50] Transcript of proceedings, November 20-21, 2006, William DeWayne Harless testifying in pertinent part at pp. 240-41:

"... Q. ... Could you explain to Her Honor, generally speaking, what you had – what you had to do, what you are doing in order to eliminate this insanitary and unsafe conditions?

A. Well, we – we are – are still rectifying some of those, but in general in the area, when things were constructed back in the '50s as far as water lines, sewer lines, storm water – storm wter [sic] retention, things like that, they were not up to today's standards.

For example, when I say we're still rectifying some of those today, on the very – the very eastern part of the project serves – serves this area. We're doing a pipe bursting project because the – the – the sewer lines have deteriorated to the point that – that they're – they're – they're almost useless. We had to do that along the northern part of the property as well.

But that is an example of all of the utilities in the area – that were deteriorating. Fire – fire require – fire department requirements, we have one of the best fire departments in the – in the country, and in order

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¶38 Courts may legitimately interfere in legislative functions of municipalities when the governmental authority has acted unreasonably, arbitrarily or in such a way as to constitute a violation of constitutional guarantees of equal protection or due process.[51] Unreasonable acts by cities have been defined as those which are manifestly unreasonable and oppressive, unwarrantedly invade private rights, clearly transcend the police power given them, or infringe upon the rights secured by fundamental law.[52]

¶39 Once only his property rights were at issue, we agree with the landowner that the better practice would have been to give him individual notice of all proceedings which might have impacted his property

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to – to – to accomplish that, they – they look at our – our – our water line systems and stuff. This was served with undersized water lines. Fire hydrant spacing has – has changed and so on.

Q. Let's look at photograph 24-U. This was taken in January of 2002, as indicated on the top of the photograph in the Court's exhibit book. We've seen this before in opening. What does this show Her Honor, if anything, about insanitary or unsafe conditions on the property?

A. Well, this is – this is just an example of some standing water, the lack of proper storm water runoff, collecting water and getting it off – off the property.

[51] *McConnell* v. *Town Clerk of Tipton,* 1985 OK 61, ¶18, 704 P.2d 479

[52] *McConnell* v. *Town Clerk of Tipton, see* note 51, *supra*; *Farmer* v. *City of Sapulpa,* 1982 OK 58, ¶12, 645 P.2d 518.

or the ownership thereof. The cases here being the third and forth time that the matter appears before this tribunal is demonstration in and of itself that it would have been a saving to the litigants and to the judicial system if the City had proceeded originally under the laws governing urban renewal projects. We can understand the landowner's frustration with having received information from City employees and council members he believes to have been misleading. Nevertheless, under the facts presented, we hold that the City's actions were not so outrageous as to support our intervention for a third time in its attempts to revitalize the Midwest City downtown area.

CONCLUSION

¶40 The legislative nature of the blight determination ends any argument that the landowner's due process rights were infringed.[53] The landowner was afforded all constitutional protections available during the condemnation proceedings. The City complied substantially with the statutory requirements of 11 O.S. 2002 §38-106(B).[54] There is ample evidence that the project area suffered from blight. Therefore, we uphold the trial court's rulings and

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[53] *Southwestern Bell Telephone Co.* v. *Oklahoma Corp. Comm'n*, *see* note 26, *supra*.

[54] Title 11 O.S. 2001 §38-106(B), *see* note 4, *supra*.

determine that the motion for oral argument should be denied.[55]

REQUEST FOR ORAL ARGUMENT DENIED; AFFIRMED.

WINCHESTER, C.J., EDMONDSON, V.C.J., HARGRAVE, WATT, TAYLOR, COLBERT, REIF, JJ., concur.

KAUGER, J., concurs in part and dissents in part.

OPALA, J., with whom KAUGER, J., joins, dissenting

¶1 I am no longer able to accede to the view a municipality's declaration that an area of the city is affected by blight is a **legislative act** which need not be preceded by personal notice to land owners within the territory included in the area and by an opportunity to contest the new status sought to be imposed upon the property. Because the described municipal declaration **immediately and directly** subjects the property located within the declared blight-affected territory to a forced sale, it must be preceded by a meaningful opportunity to the owners to defend against and contest the action that will expose their land to immediate law-compelled alienation.

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[55] Our holdings in the consolidated appeals are based on Oklahoma law constituting separate, adequate, and independent state grounds for our decision. *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

¶2 One's claim to the protection of due process will not be defeated by a clever use of word games.

SUPREME COURT STATE OF OKLAHOMA

MONDAY, DECEMBER 15, 2008

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

104,349 City of Midwest City; and Midwest City Urban Renewal Authority v. House of Realty, Inc., and Robert J. Barton, et al
Rehearing is denied.
CONCUR: Winchester, C.J., Edmondson, V.C.J., Hargrave, Watt, Taylor, Colbert, Reif, JJ.
DISSENT: Opala, Kauger, JJ.

104,552 Adell McDonald v Williams Discount Foods
Petition for certiorari is denied.
CONCUR: Winchester, C.J., Edmondson, V.C.J., Hargrave, Kauger, Watt, Taylor, Colbert, Reif, JJ.
DISSENT: Opala, J.

104,504 (Cons w/104,604 & Comp w/104,596) Patricia Bowers Edwards, individually & as natural mother & next friend of Robert Drew Bowers, an incapacitated person v. Rex Urice, an individual, et al
Petition for certiorari is denied.
CONCUR: Edmondson, V.C.J., Hargrave, Watt, Taylor, Colbert, Reif, JJ. NOT PARTICIPATING: Winchester, C.J., Kauger, J.
DISQUALIFIED: Opala, J.

104,596 (Comp w/104,594) Patricia Bowers Edwards, individually & as natural mother & next friend of Robert Drew Bowers, an

incapacitated person v. Fellers, Snider, Blankenship, Bailey & Tippens
Petition for certiorari is denied.
CONCUR: Edmondson, V.C.J., Hargrave, Watt, Taylor, Colbert, Reif, JJ. NOT PARTICIPATING: Winchester, C.J., Kauger, J. DISQUALIFIED: Opala, J.

104,938 Coastal Asset Recovery, LLC v. Martha P. Creasy, an individual
Petition for certiorari is denied.
ALL JUSTICES CONCUR

105,087 In the Matter of the Petition of the Town of Forest Park and The City of Spencer v. Ann Elaine Campbell
Petition for certiorari is denied.
CONCUR: Winchester, C.J., Edmondson, V.C.J., Kauger, Watt, Taylor, Reif, JJ.
DISSENT: Hargrave, Opala, JJ.
NOT PARTICIPATING: Colbert, J.

/s/ James R. Winchester
CHIEF JUSTICE

OPPOSITION BRIEF

No. 08-1164

In The

Supreme Court of the United States

HOUSE OF REALTY, INC.,

Petitioner,

versus

CITY OF MIDWEST CITY, MIDWEST CITY URBAN RENEWAL AUTHORITY, and MIDWEST CITY MEMORIAL HOSPITAL AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The City of Midwest City is a municipality of the State of Oklahoma. Midwest City Urban Renewal Authority is a public body corporate of the State of Oklahoma. Midwest City Memorial Hospital Authority is a public trust organized and existing under the laws of the State of Oklahoma. There is no parent or publicly held company owning 10% or more of any of the foregoing entities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Introduction

This certiorari Petition challenges the procedure for determining blight. Examples of the blight proven to exist in the project area include: "asbestos or gasoline contamination," soil contamination on the property located adjacent to the landowner's, ongoing deterioration of structures, public utility deficiencies, and lack of adequate parking. *City of Midwest City v. House of Realty, Inc.* ("*House of Realty III*"), 2008 OK 28, ¶ 37, 198 P.3d 886, 900. Thus, the fact of the blight's existence is not in issue. *See id.* (the record is "replete with evidence to support the existence of blight in the project area").

Petitioner, however, argues that proceedings for determining blight justify this Court's review, citing purported "confusion among state courts" about whether prior "due process" notice is necessary, the judicial-like nature of the proceeding, and the failure of Respondents to comply with *Matthews v. Eldridge*.[1] In fact, Petitioner has adduced no confusion among the state courts not attributable to statutory differences; the process has been repeatedly held to be legislative; and *Matthews v. Eldridge* is inapplicable.

Pursuant to *Rules of the Supreme Court of the United States*, Rule 15(1), Respondents will address

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[1] 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

"perceived misstatement[s] of facts and law," including material omissions and "half-truths." They will provide these corrections in the chronological order of the event.

The Parties

Respondents are the City of Midwest City ("Midwest City"), the Midwest City Urban Renewal Authority ("Urban Renewal Authority") and Midwest City Memorial Hospital Authority ("Hospital Authority"). Although Urban Renewal Authority was the primary condemnor below, it lacks the "powers or authority . . . to determine an area to be a blighted area and to designate such area as appropriate for an urban renewal project." Okla. Stat. Tit. 11, § 38-108(B)(1). The Hospital Authority was a defendant in a declaratory judgment action brought by Petitioner and others that was consolidated with the condemnation action for trial, and then on appeal the declaratory judgment appeal was consolidated with the condemnation appeal. Midwest City, the Urban Renewal Authority and the Hospital Authority are referred to collectively as the "City."

Petitioner and "landowner" is a corporation "owned" by an individual named "Barton." [Trial transcript ("Tr.") at 92, 93.] Mr. Barton's daughter ("Ms. Barton-Stober") is a former member of the City Council of Midwest City ("City Council") and a licensed realtor. [Tr. at 92-94, 100.] Her City Council tenure ended the month preceding the Council's

adoption of its initial resolution finding this project area blighted. [*See id.*] Ms. Barton-Stober had begun working with Mr. Barton marketing and selling real estate in 1992. [Tr. 92-94.] She has continued in the real estate business at material times since then, and she served as Petitioner's primary witness at trial. [Tr. at 92-94.]

The Initial Blight Determination

The formal determination that the subject "project area" was blighted stretches back to the Spring of 2002, although public concern about conditions in what would come to be known as the project area extended for more than two decades. [*See* City Trial Exhibit 6B at pp. 046212–04626.] The City Council initially adopted a finding of blight by resolution dated May 28, 2002. *House of Realty III*, 2008 OK 28, ¶¶ 7, 23, 24, 198 P.3d at 891, 897. Moreover, it was the "project area," not specifically Petitioner's one and a fourth (1¼) acre tract, that was found to have been blighted. *See id.*, n. 16, 198 P.3d at 891, n. 16, citing *City of Midwest City v. House of Realty, Inc. [House of Realty I]*, 2004 OK 56, ¶ 35, 100 P.3d 678, 690. Petitioner's tract is but a fraction of the approximately 80 acre project area. *See id.* In later years the City would rely on that 2002 blight finding, at least in part, for every blight determination concerning this project area. *See House of Realty III*, ¶¶ 23, 24, 198 P.3d at 897.

The "Activation" Statute

Oklahoma Statute, Title 11, Section 38-105(B)(1) is the Subsection Petitioner cites as being "involved" in the issues it asks this Court to review. [Petition at p. 2.] The "context" of that statute is important to its understanding. The Oklahoma Legislature has "created" in **each** of the state's incorporated cities or towns an "Urban Renewal Authority." Okla. Stat. Tit. 11, § 38-107(A). However, that urban renewal authority cannot transact business or exercise powers "until or unless" the municipality's governing body provides the "finding prescribed in Section 38-105." *See* § 38-107(A). Thus, Section 38-105 will sometimes be referred to as the "activation" statute because it is a procedural mechanism through which a municipality activates the legislatively created urban renewal authority.

According to Title 11, Section 38-105, a prerequisite to activation under Subsection B is the city council's adoption of "a resolution finding that: (1) One or more blighted areas exist in its area of operation." This blight finding required for activation need not relate to a particular project or even contemplate an eminent domain taking. Once activated, the urban renewal authority can transact business and exercise the powers conferred by statute, and the exercise of those enabled powers is not limited to any particular project or project area. *See* Okla. Stat. Tit. 11, § 38-107.

The "Workable Program" Statute

The only other Oklahoma Statute cited by Petitioner is Title 11, Section 38-103. It directs a city to "formulate for its area of operation a workable program for utilizing appropriate private and public resources" to achieve specified goals in dealing with blight. *Id.* Those statutorily prescribed goals include eliminating and preventing "the development or spread of blight," encouraging "needed rehabilitation," providing "for the redevelopment of blighted areas," or undertaking any of the foregoing "or other feasible public activities as may be suitably employed to achieve the objectives of the workable program." *Id.* Matters which the "workable program" may address

> include, without limitation . . . : the prevention of the spread of blight into areas of the municipality which are free from blight through diligent enforcement of housing, zoning and occupancy controls and standards; the rehabilitation or conservation of blighted areas or portions thereof by replanning, removing congestion, providing parks, playgrounds and other public improvements, by encouraging voluntary rehabilitation and by compelling the repair and rehabilitation of deteriorated or deteriorating structures; and the clearance and redevelopment of blighted areas or portions thereof.

Okla. Stat. Tit. 11, § 38-103.

Subsequent Blight Determinations

On September 14, 2004, Midwest City's Urban Renewal Authority was activated through Resolution No. 2004-19. *See House of Realty III*, n. 17, 198 P.3d at 892, n. 17; City Trial Exhibit 5. The Resolution expressly found and confirmed that "blighted areas . . . exist within the corporate boundaries and jurisdiction of the City." *House of Realty III*, n. 17, 198 P.3d at 892, n. 17; [City Trial Exhibit 5 at p. 2, ¶ 1.] The City Council declared the Urban Renewal Authority's exercise of enumerated powers of blight remediation and redevelopment to be "necessary [and] in the interest of the public health, safety, morals and welfare of the residents of such areas," and found the exercise of Urban Renewal Act powers to be "in the public interest." [City Trial Exhibit 5 at p. 2, ¶¶ 1 & 2.] Additionally, it "confirmed the May 28, 2002, finding of blight and directed that an urban renewal plan be prepared for the development area. . . ." *House of Realty III*, ¶ 7, 198 P.3d at 892; *see id.*, ¶ 25, 198 P.3d at 898.

Two days later, pursuant to this City Council direction, the Urban Renewal Authority, on September 16, 2004, approved Resolution No. URA 2004-04, recommending approval of the Midwest City Downtown Urban Renewal Plan ("Urban Renewal Plan"). [*See* Landowner Trial Exhibit 25 at p. 04616.] That Urban Renewal Authority meeting where the Urban Renewal Plan received its initial approval, was attended both by Ms. Barton-Stober and Counsel for the Landowner Corporation, Petitioner here. [Tr. at

126, 127; Landowner Trial Exhibit 25 at p. 04616.] Thus, Petitioner was represented at, and its counsel participated in, the Urban Renewal Authority public meeting when it recommended approval of the Urban Renewal Plan. [*See* Landowner Trial Exhibit 25 at p. 04616.] There is no suggestion in either the minutes of the September 16th Urban Renewal Authority meeting or the trial transcript that Urban Renewal Authority either refused to answer Petitioner's questions or to hear its position.

On October 12, 2004, the Urban Renewal Plan was presented to the City Council. *See House of Realty III*, ¶ 7, 198 P.3d at 892. At that time the Council adopted Resolution No. 2004-25, which included blight findings, and it "readopted" the May 28, 2002, finding of blight. *Id.*, ¶¶ 7 & 25, 198 P.3d at 892 & 898. That October 12, 2004, Resolution also "adopted the . . . Urban Renewal Plan and authorized the acquisition of property through condemnation as identified in the plan." *Id.*, ¶¶ 7 & 25, 198 P.3d at 892 & 898.

Condemnation Proceedings

The Urban Renewal Authority caused a Petition to Select and Summon Commissioners ("Condemnation Petition") to be filed on November 23, 2004, invoking the trial court's condemnation power under Oklahoma Statutes Title 11, Sections 38-101 through 38-119 ("Urban Renewal Act") and the Urban Renewal Plan. [*See* Condemnation Petition.] The Condemnation

Petition expressly cites *House of Realty I* and the Oklahoma Supreme Court's holding "that a municipality may achieve urban renewal through the mechanism of an Urban Renewal Authority, which may exercise the power of eminent domain." *House of Realty I,* 2004 OK 56 at ¶ 24, 100 P.3d at 687. The Urban Renewal Authority deemed it advisable and necessary to own, in fee simple, the Petitioner's Property for redevelopment in accordance with the Urban Renewal Plan. [Condemnation Petition p. 6, ¶ 7.] (Midwest City was a co-plaintiff for condemnation of approximately 10 feet of public right-of-way. [Condemnation Petition p. 5, ¶ 6.]) On December 2, 2005, Petitioner filed its Exceptions to Report of Commissioners and Demand for Jury Trial of Defendant House of Realty, Inc. ("Exceptions"), challenging Urban Renewal Authority's right to take.

Trial lasted two days. *House of Realty III*, ¶ 9, 198 P.3d at 893. In addition to testimony, photographs and other exhibits establishing blighted conditions in the area, the evidence confirmed the City's compliance with the statutorily prescribed notice for each of the meetings where the City Council found the area blighted, as well as the Urban Renewal Authority and City Council meetings where the Urban Renewal Plan was approved and adopted. *Id.*, n. 26, 198 P.3d at 895, n. 26. The Oklahoma Supreme Court would find that "the landowner[, Petitioner here,] does not argue that he was denied due process in the condemnation proceeding. Indeed, he has exercised

those rights vigorously over the last eight years." *Id.*, ¶ 19, 198 P.3d at 897.

The trial court "sustained the City's findings of blight; found the City's urban renewal plan to have been validly adopted in accordance with the urban renewal laws [cite omitted]; and denied the landowner's exceptions to the commissioners' report." *See House of Realty III*, ¶ 7, 198 P.3d at 892. The Supreme Court of Oklahoma affirmed on all issues.

ARGUMENT AND AUTHORITIES

I. THERE IS NO "CONFUSION AMONG STATE COURTS" IN THIS AREA.

Procedures for identifying and remediating blight are similar but not entirely uniform among the states. Under the statutory schemes and case law, after the presence of blight is found, a landowner is afforded due process protections through the condemnation process. *See House of Realty III*, n. 28, 198 P.3d at 896, n. 28. What material differences exist are traceable to statutory and fact variations, rather than inconsistent judicial interpretation. *See id.* Petitioner, however, asserts that this Court should resolve some purported "confusion among state courts" concerning the rights of property owners to due process-type notice and hearing prior to blight determination. The sole source of such "confusion," as cited by Petitioner, is a more than 40-year-old Indiana case involving a

statutorily mandated quasi-judicial hearing. [*See* Petition at 13, 14.]

Not one of the cases surveyed by the Oklahoma Supreme Court supports the Petitioner's assessment of "confusion among state courts." *See House of Realty III*, n. 28, 198 P.3d at 896, n. 28. The overwhelming majority of cited cases are consistent. For example, the reasoning of the Supreme Courts of Wisconsin and Pennsylvania are entirely compatible with that of the Oklahoma Supreme Court: blight determinations do not require due process procedures because they are not takings, citing *David Jeffrey Co. v. City of Milwaukee,* 267 Wis. 559, 66 N.W.2d 362 (1954), and blight certification does not have a legal effect on property rights, citing *In re Condemnation by Urban Redevelopment Auth. of Pittsburgh,* 527 Pa. 550, 594 A.2d 1375 (1991), *cert. denied,* 502 U.S. 1004, 112 S.Ct. 638, 116 L.Ed.2d 656 (1991). *See House of Realty III*, n. 28, 198 P.3d at 896, n. 28.

The Oklahoma Supreme Court holds in this case that the City Council's multiple adoptions of resolutions and ordinances containing determinations of blight, beginning in 2002, constitute necessary prerequisites to adoption of redevelopment plans and possible use of condemnation proceedings. *House of Realty III*, ¶ 18, 198 P.3d at 896. Blight determinations are not takings; they do "not authorize any individual to enter the landowner's property." *House of Realty III*, ¶ 18, 198 P.3d at 896, citing *Pippin v. Board of Comm'rs of Okmulgee Co.*, 1922 OK 305, 209 P. 929. Therefore, "due process of law promised by the

Constitution was afforded to the property owner through participation in the condemnation proceedings." *House of Realty III*, ¶ 18, 198 P.3d at 896, citing *Pippin v. Board of Comm'rs of Okmulgee Co., supra.*

The three cases which the Oklahoma Supreme Court cites as being contrary to the majority view are the result of particular statutory considerations and facts. *See House of Realty III*, n. 28, 198 P.3d at 896, n. 28. For example, *Merrill v. City of Manchester,* 124 N.H. 8, 466 A.2d 923 (1983), held that landowners who had been denied a hearing before blight determination were denied equal protection under the New Hampshire Constitution because they were treated differently than highway condemnees who did enjoy a pre-taking hearing. As noted by the Oklahoma Supreme Court, *W & G Co. v. Redevelopment Agency of Salt Lake City,* 802 P.2d 755 (Utah App. 1990), involved notice required under the particular statutory scheme, and *In re City of Scranton,* 132 Pa. Cmwlth. 175, 572 A.2d 250 (1990), held that rights of the property owner were not so affected at the time of blight certification as to require due process procedures. *See* 2008 OK 28, n. 28, 198 P.3d at 896, n. 28.

Likewise, a distinguishable statutory scheme and facts were before the Indiana Supreme Court in *Jefferson Redevelopment Commission v. City of Jeffersonville,* 248 Ind. 468, 229 N.E.2d 825 (1967) ("*Jeffersonville*"), the one case that Petitioner cites in support of its purported "confusion among state courts" position. The hearing reviewed in *Jeffersonville* initiated the process and was for the purpose of condemning

specific property.[2] *See Brenwick Associates, LLC v. Boone County Redevelopment Commission*, 870 N.E.2d 474, 483 (Ind. Ct. App. 2007), *rev'd in part*, 889 N.E.2d 289 (2008) ("*Brenwick*") (explaining *Jeffersonville*). The controlling statute was the Indiana Redevelopment of Cities and Towns Act of 1953, as amended through 1963 (Burns' Ind. Stat. Anno., §§ 48-8541 - 48-8567), since superceded. It required a quasi-judicial administrative hearing which would lead "to the condemnation of certain property." 248 Ind. at 469, 470, 229 N.E.2d at 826.

The contrast between the law of Indiana 40 years ago and Oklahoma today arises from material differences in statutes, not case law. The Oklahoma statutes provide that the city's legislative body (the "municipal governing body"), such as the city council, adopt resolutions determining the existence of blight and establishing the urban renewal plan. Okla. Stat. Tit. 11, § 38-106(B); *and see* Okla. Stat. Tit. 11, § 38-108(B)(1), *supra* (the urban renewal authority's powers "shall not include [t]he power to determine an area to be blighted and to designate such area as

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[2] The prospect of immediate condemnation is one of the material differences between *Jeffersonville* and *Reel Pipe & Valve Co. v. Consolidated City of Indianapolis-Marion County*, Ind. App. 5 Dist., 633 N.E.2d 274 (Ind. Ct. App. 1994), which Petitioner asserts is inconsistent. The landowner's property in *Reel Pipe & Valve Co.* had merely been placed on a list, and "at some point in the future, the Commission may or may not proceed to acquire such property. . . ." *Id.* at 279.

appropriate for an urban renewal project.") Neither the statutory language nor any judicial interpretation has suggested that the city council when acting in this area, does so in anything other than a legislative capacity. *See House of Realty III*, ¶¶ 2, 11-14, 198 P.3d at 890, 893, 894. Moreover, unlike the *Jeffersonville* statutory scheme where the redevelopment commission hearing was for the purpose of condemning the property before it, a city council's adoption of blight resolutions and urban renewal plans may or may not result in condemnation of specific property. At most such actions are "preliminary step[s] necessary to allow the institution of condemnation proceedings." *House of Realty III*, ¶ 18, 198 P.3d at 896.

Under the Indiana statute of yesteryear, a department of development was tasked with providing an administrative hearing of a "quasi-judicial" nature which immediately preceded condemnation. 248 Ind. at 469, 470, 229 N.E.2d at 826. The statute mandated that the commissioners were to "hear all persons interested in said proceedings and shall consider all such written remonstrances and objections as have been filed." 248 Ind. at 469, 470, 229 N.E.2d at 826.

Reaching for an analogy while avoiding text-driven distinctions, Petitioner quotes *Brenwick's* assessment of *Jeffersonville* as holding that a landowner "at risk of losing property due to a determination of blight should enjoy the due process rights of cross-examination and hearing all evidence against them." [Petition at 14, citing *Brenwick*, 870 N.E.2d at 484.] Petitioner ignores both the *Brenwick* Court's

predicate that the "redevelopment commission initiated proceedings to condemn certain property it deemed to be blighted," and its conclusion that the "holding was based on the quasi-judicial nature of the proceedings at issue." *Id.* at 483, 484.

In summary, *Jeffersonville* does not constitute a judicial aberration. It is understandable in the context of its facts and controlling statutory scheme. There are and have been differences in the various state statutes as applied to specific facts. There is, however, no material confusion among the state courts which requires this Court's attention.

II. THE CITY'S ACTIONS CONSTITUTE A VALID EXERCISE OF THE POLICE POWER THROUGH THE CITY COUNCIL FUNCTIONING LEGISLATIVELY, NOT AS A QUASI-JUDICIAL ADMINISTRATIVE AGENCY.

The Police Power

"Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). By adopting resolutions finding blight and providing plans for its remediation through redevelopment, the City Council exercised its police power in Midwest City. *See id.* at 31-33, 75 S.Ct. at 102-103 (redevelopment of blighted project area in District of Columbia constituted a valid exercise of the police

power). In the language of this Court, the Council was engaged in its role as "the main guardian of the public needs" for Midwest City. *See Berman v. Parker*, 348 U.S. at 32, 75 S.Ct. at 102.

Petitioner impliedly admits that the City Council's actions were for Midwest City's "public needs" by expressly declining to "challenge the City's claim that the property is being taken for a 'public use' or for a '**public purpose**.'" [Petition at 10, 11 (emphasis added.)] The Urban Renewal Act,[3] including Sections 38-105(B)(1) and 38-106(B) and its other legislatively-designated "powers," exist "for public uses and purposes for which public money may be expended and the power of eminent domain and police power exercised. . . ." Okla. Stat. Tit. 11, § 38-102. The legislatively-stated rationale is that "there exists in certain municipalities blighted areas as . . . defined which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of said municipalities. . . ." *Id.* In summary, Midwest City's "public needs" specifically include the need to deal with blight. *See Berman v. Parker*, 348 U.S. at 32, 75 S.Ct. at 102; Okla. Stat. Tit. 11, § 38-106(B).

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[3] The Oklahoma Supreme Court holds in this case that the City complied with the Urban Renewal Act. *House of Realty III*, ¶¶ 3, 20-40, 198 P.3d at 880, 881, 897-901.

Under these circumstances, the City Council's actions clearly meet any police power test of "reasonableness." *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-595, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962), citing *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894) ("reasonableness" was basis for assessing validity of town's exercise of police power in adopting ordinance, including being required by public interests for accomplishment of its purpose and not being unduly oppressive to individuals); *Pennell v. City of San Jose*, 485 U.S. 1, 11-14, 108 S.Ct. 849, 857-858, 99 L.Ed.2d 1, 14-15 (1988) (municipal rent control ordinance was "unconstitutional" only if arbitrary, discriminatory, or demonstrably irrelevant to a valid legislative purpose). The City's actions, as adjudged by the Oklahoma Supreme Court, have obviously been "reasonable," and this Court should not intervene. *See Goldblatt v. Town of Hempstead, supra.*

Even in the usual case, the judiciary's role "in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker*, 348 U.S. at 32, 75 S.Ct. at 102. The decision to exercise Midwest City's police power is for the City Council and the City Council "alone to determine, once public purpose has been established." *See id.* at 33, 75 S.Ct. at 103. This "public purpose" has not only been established but, in the context of this Court's potential review, it is conceded.

The City Council's Legislative Function

The century-old analysis of Justice Holmes in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908), a ratemaking case, remains the touchstone for sorting legislative and judicial functions:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. . . .

The City Council's finding of facts in the process of determining the existence of blight does not turn a legislative process into a judicial one. *See id.* at 227, 29 S.Ct. at 69 ("it does not matter"). "Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up." *Id.* at 227, 29 S.Ct. at 69-70.

The "act legislative" here is blight remediation, including the City Council's adoption and approval of resolutions under the Urban Renewal Act. The two statutes specifically raised by Petitioner are the "activation" and "workable program" statutes, Title

11, Sections 38-105(B)(1) and 38-103, respectively. Both are clearly legislative "in kind," as is the entire blight remediation process.

By any definition, the "activation" statute is "legislative." It provides a procedural mechanism through which a city's legislative arm can activate its urban renewal authority. The city's council must adopt a resolution finding the existence of one or more blighted areas which this City Council did. *See* Okla. Stat. Tit. 11, § 38-105(B)(1). It "look[ed] to the future and chang[ed] existing conditions" by "activating" the Urban Renewal Authority, the powers and authority of which could "thereafter" be invoked for the benefit of Midwest City. The blight finding for activation sufficed for all future projects and need not be repeated for the next one. It is difficult to imagine a court, rather than a city council, activating an agency so that the jurisdiction would have statutorily conferred powers available in the future. Were a court to do so, however, it would be acting in a legislative, rather than judicial, capacity.

The other statute which Petitioner cites, the "workable program" statute, Title 11, Section 38-103, is again clearly legislative in nature. It deals with formulation of "a workable program for utilizing appropriate private and public resources" to achieve certain blight fighting goals, such as eliminating and preventing "the development or spread of blight." *Id.* Again, the "workable program" may address a variety of blight fighting methods, such as preventing spread of blight into blight free areas on the one hand, to

clearing and redeveloping blighted areas. *Id.* The "workable program" may need to be updated in the future, as is the case with much legislation, but it may or may not be repeated in the future. As with the activation statute, it is difficult to imagine a court, as opposed to a legislative body, authoring a "workable program" so that the jurisdiction would have the guide available in the future. Again, were a court to do so, it would be acting in a legislative, rather than judicial, capacity.

Petitioner erroneously views blight identification and remediation as concerning only present owners of blighted property at the present time. [*See* Petition at 19.] That insular perspective is belied by the Urban Renewal Act and the City Council's resolutions and ordinances repeatedly adopted to deal with blight. However, Petitioner concedes that it is "**not** challenging the City's redevelopment plan, a seemingly 'legislative decision.'" [Petition at 19 (emphasis added.)] It then argues that the City's "'investigating' and declaring their property to be blighted" is "judicial." *Id.* On the contrary, the redevelopment plan which Petitioner concedes to be "legislative," and the "investigating" of blight are parts of the same inquiry and decision. In the words of Justice Holmes, "Most legislation is preceded by hearings and investigations." 211 U.S. at 227, 29 S.Ct. at 69-70. Whether the hearings and investigations involve legislative or judicial functions "is determined by the nature of the act to which the inquiry and decision lead up." 211 U.S. at 227, 29 S.Ct. at 69-70. The "act" here is blight

remediation through redevelopment which is clearly legislative.

Finally, Petitioner accuses the City and the Oklahoma Supreme Court of a "clever use of words," or "labels," what amounts to asserting that there has been a "sleight of labels" to avoid providing due process. [*See* Petition at 17-19.] In taking that position, Petitioner ignores important substantive differences between a city council's legislative determination that blight remediation is appropriate and a specific condemnation case presented to a judge and jury.

The City has previously cited the consistent and overwhelming case law holding that a landowner's entitlement to notice and a due process-type hearing comes into play in a condemnation action. A court affording the landowner full due process rights must pass on whether there is a "right to take" all or part of the property. Through that review the court focuses on the previous determination by the legislative body and examines whether that process was arbitrary and capricious. The decision by the judge must precede a jury trial on value.

The condemnation lawsuit provides clear contrast to what preceded it before the legislative body where, if Petitioner disagrees, its remedy is political. While city or state laws may give an owner a right under some circumstances to know what legislative determinations are being debated, the legislative process does not by its nature guarantee a right by

any person to cross examine, be heard or directly participate in legislative determinations. By requiring many deliberations to be in the open, the protection to the public is the power to change the composition of the legislative body or seek modification of the legislative action if voters don't agree with its judgment. For just such political reasons the meetings are public. There is no due process right to participate in the legislative policy making process itself. Any such guarantee would often be utterly unworkable in the formulation of policy.

Matthews v. Eldridge

Matthews v. Eldridge involved a challenge to the constitutional validity of administrative procedures applicable to termination of social security disability benefits. This Court held that a pre-termination evidentiary hearing is not required prior to termination of disability benefits.

As above-indicated, the City Council's action in identifying and remediating blight constitutes a valid exercise of its police power and is legislative in nature. *Matthews v. Eldridge* is in no way applicable.

CONCLUSION

There is no valid reason for this Court to allocate its time and resources to reviewing the Oklahoma Supreme Court's holdings in *House of Realty III*. There is no material confusion among the state courts, and the Oklahoma scheme for blight identification and remediation as exercised by this City Council constitutes a legislative exercise of Midwest City's police power. No important federal question has been decided in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. No important question of federal law has been decided that has not been, but should be, settled by this Court. No important federal question been decided in a way that conflicts with relevant decisions of this Court.

Respectfully submitted,

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